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In the Supreme Court of the United States

OCTOBER TERM, 1904.

No. 154.

CITY OF DAWSON,

Appellant,

vs.

COLUMBIA AVENUE SAVINGS FUND SAFE DEPOSIT TITLE & TRUST COMPANY,

Appellee.

BRIEF ON BEHALF OF THE
COLUMBIA AVENUE SAVINGS FUND SAFE DEPOSIT TITLE & TRUST COMPANY,
APPELLEE.

THE FRANKLIN PRTG. & PUB. CO., ATLANTA, GA.

NARRATIVE STATEMENT.

On February 21, 1890, the city of Dawson, acting in its corporate capacity, by ordinance entered into a contract whereby R. L. Bennett, his associates, successors and assigns were to become incorporated under the laws of the State of Georgia under the name of the Dawson Waterworks Company, which company, within the time limited, was to construct, complete and have in operation a thorough system of waterworks in accordance with the specifications and plans of the contract, and was, from time to time, to extend its mains and pipes and enlarge its system to meet increasing demands consequent upon the growth of the city. And in consideration of the company's agreeing to furnish a free and unrestricted use of its water for fire protection for a period of twenty years, the city of Dawson undertook and agreed to pay to "said company, or to such trust company as the Dawson Waterworks Company may elect or decide upon as the trustee for their bonds, the sum of $2,000.00 annually for twenty years in semi-annual payments of $1,000 each, on the first days of January and July of each year."

The ordinance provided that a tax sufficient to pay said rentals should be annually levied for that purpose upon the taxable property in said city.

The ordinance required the company to build and have in operation within eighteen months a complete and thorough system of waterworks, to consist of four and eight-tenths miles of pipe of four, six and eight inches in diameter, with a reservoir of not less than forty thousand gallons capacity, "and of sufficient height to produce a pressure on the mains such that from any hydrant located on any principal street a stream of water will be projected fifty feet in still air through one hundred feet of fire hose with one-inch nozzle attached."

The contract contained the following provision:

"That in consideration of the said company agreeing to

furnish water to the public municipal building and further agreeing to furnish water to two public fountains of ⅛ inch nozzle each, the city of Dawson hereby obligates itself to remit to said company, its successors and assigns, any and all license fees, taxes, dues and charges which may at any time hereafter be levied or assessed by said city against said company or upon the plant to be used in said waterworks system."

The ordinance also contained the following provision:

"The said company and their successors and assigns shall be and are required from the completion of their system of waterworks, until their charter shall cease, to furnish a sufficient supply of water for the purposes before and hereinafter mentioned, unless prevented by unavoidable and providential causes; in such event they shall be allowed a reasonable time to make repairs, and if after such reasonable time has been allowed they should still fail to furnish said supply of water, their franchise from that fact be forfeited."

The ordinance provided that its provisions should "be mutually binding upon the city of Dawson and R. L. Bennett and associates and the company to be organized by them in pursuance of the provisions thereof, and it shall have the force and effect of a contract between the respective parties as fully and completely as if it were drawn in that form and signed by the contracting parties."

[Record, pages 287–291.]

The ordinance was unanimously adopted at a full meeting of the City Council of Dawson, was published in full in the local newspaper, and the corporation was duly formed for the purpose of carrying out the contract, and the works duly constructed and accepted by the city after being tested and found to be fully up to the requirements of the contract.

The charter of the city of Dawson, in its general welfare clause, declares:

"Be it further enacted, That the said mayor and aldermen shall have power and authority from time to time, to

make, ordain and establish such by-laws, ordinances, rules and regulations as shall, to them, appear necessary and proper for the security, welfare, convenience and interests of said city of Dawson, and the inhabitants thereof, and for preserving the health, morals, peace, order and good government of the same, and not inconsistent with the Constitution and laws of Georgia."

[Record, page 222.]

As will be seen from the decisions hereinafter quoted, the courts of Georgia have uniformly held that cities and towns in Georgia have authority to provide for water supply, and no restrictions exist as to the manner in which such supply shall be provided, further than the construction recently given by the court to the constitutional provision relating to debt. In fact it will be seen from an examination of the various Georgia cases hereinafter cited, in which municipal contracts for water supply have come before the court, that in none of these cases was there any express provision in the charter of either of the cities touching the subject of water supply, or any authority to provide for water supply further than such as is derived from those general provisions commonly known as the "General Welfare Clause," and which, in several of the charters, is less full than the clause in the charter of the city of Dawson just quoted. And the decision of the Supreme Court of Georgia in the case of City Council of Dawson vs. Dawson Waterworks Company, 106 Ga. 696, hereinafter referred to, concedes that the city of Dawson had authority under its charter to provide for water supply.

At the time the contract was entered into and the works constructed thereunder, there had been no decision by the courts of Georgia that a contract by a municipal corporation for a supply of water, or gas, or like necessary, to be paid for from year to year as furnished, created a debt within the meaning of article 7, section 7 and section 10 of the Constitution of the State. On the contrary, while the precise question had never been expressly decided, the trend of the decisions up to that time and the reasoning of the Court pointed to the conclusion that such a contract did not create a debt within the meaning

of the constitutional provision just referred to; and this Court in the case of Walla Walla *vs.* Walla Walla Water Company, 172 U. S. 1, 20, mentions Georgia as one of the States holding that a contract of this character did not fall within such limitations.

Such, too, was the contemporaneous construction given to those constitutional provisions by the Legislature of the State as well as the courts. For, although by general statute it is provided that cities may enter into contracts with waterworks companies for the supply of water for public purposes (Code of Georgia, sections 2407, 2408, 2409), there was no law prescribing the manner of holding elections to determine the question of incurring any debt for such purpose.

In other States the precise question had been decided, and as the Supreme Court of Georgia frankly states in the decision subsequently rendered by that court in 1899 and above referred to, (106 Ga. 696, 714), the current of authority on the subject was that such contracts did not create a debt within the meaning of such constitutional provision; and in cases decided by our State court prior to the time the contract was entered into, several of these cases are cited with approval.

It will be seen, however, from the record that the qualified voters of the city of Dawson had been given an opportunity to vote on the question of incurring the necessary expense of water supply. On June 11, 1886, the city of Dawson submitted to the qualified voters of the city, by publication of a notice thereof for four weeks in the newspaper in which legal notices were published, the question whether the city should incur the expense of waterworks. The election was held and more than two-thirds of the qualified voters cast their ballot in favor of incurring the expense of waterworks. The result of the election was declared to be in favor of waterworks. It was satisfactory to the voters to leave it to the city council to determine the manner in which the water supply should be furnished, whether by contract with a waterworks company or by municipal ownership, and the city council did not act hastily or unadvisedly, but during the three and one-half years that intervened

between the election and the making of the contract, thoroughly canvased the entire situation, and adopted the plan which they thought most to the interest of the city and its inhabitants. The action of the city council in entering into the contract met the universal approval of the citizens, and during the eighteen months that intervened between the making of the contract (the provisions of which were published in full in the local newspaper) and the completion of the works, it appears from the evidence, that not a voice was raised in opposition to the plan adopted, but the greatest enthusiasm prevailed amongst all classes over the satisfactory solution of the question of water supply.

It will be seen from an examination of the contract that it was the intention of the parties that the supplying of water by the Waterworks Company to the city and its inhabitants was to be exclusive ; that the city would not enter into competition with the Waterworks Company in the declared purpose of the contract "of supplying said city and its inhabitants with water for protection against fire and for domestic, sanitary and other useful purposes." This intention appears from the express language of the contract and the terms and stipulations are such as leave no room for doubt. The contract in its first section grants "the exclusive right and privilege . . . . . of constructing and maintaining and operating a system of waterworks for the purpose of supplying said City and its inhabitants with water for protection against fire and for domestic, sanitary and other useful purposes." In section second, it is declared "that the said Company for the purpose of constructing, maintaining, operating, extending and repairing said system of waterworks *shall have the sole and exclusive privilege* and full power, right and authority to lay water-pipes and mains along any and all the streets and avenues of said City," etc. In section ten, the last section but one of the ordinance, it is provided that the Dawson Waterworks Company, which was to be organized and chartered under the corporation laws of the State, was to have "*the exclusive right to construct, maintain and operate a system of waterworks in said city of Dawson for the purpose of supplying said city, its in-*

habitants, citizens and residents with water for protection against fire, and for domestic, sanitary and other useful purposes." Section eleven of the ordinance which constitutes the contract, is in the following words:

> "That the provisions of this ordinance shall be mutually binding upon the city of Dawson, and R. L. Bennett and associates, and the company to be organized by them in pursuance of the provisions thereof, and it shall have the force and effect of a contract between the respective parties as fully and completely as if it were drawn in that form and signed by the contracting parties."
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> [Record, pages 288, 210, 211.]

On November 12, 1889, about three months before the contract was entered into, the General Assembly of the State of Georgia passed a general act conferring on corporations or persons "constructing, owning, operating, or carrying on waterworks in this State" the right of eminent domain, by which they may acquire all land or easements of land "necessary or proper for the construction and successful operation of waterworks" by condemnation proceedings instituted and conducted in the manner provided by the Code. This act is codified as sections 2407, 2408, 2409 of the Code of Georgia (edition of 1895). The said act confers the privileges therein mentioned upon waterworks companies, or individuals supplying water for public purposes to municipal corporations, and to none others, the language used as to such purposes being as follows:

> "None of the provisions of the two preceding sections shall become operative until after the said corporation, company, or individual shall have *bona fide* entered into a contract with the proper authorities of some incorporated city or village of this State for supplying water for public purposes."

There is nothing in the Constitution or the laws of the State of Georgia, or in the charter of the City of Dawson, or in the above named act, to restrict the power of the city to contract with one company or individual for an exclusive supply of water

for such reasonable length of time as may be fixed by the contract. There is nothing in the act to indicate that it was the purpose of the Legislature to so limit and restrict the city as to forbid that it should contract for its entire supply from a single company, or that the city should not be permitted to contract that it would not itself enter into ruinous competition with the water company during the life of the contract, while the water company was faithfully carrying out the obligations of the contract on its part. Nothing in the Constitution or laws of this State requires that a city, exercising the business power of contracting with a company for supplying water for public purposes, should reserve to itself the power of wasting the public funds and the moneys of the taxpayers by establishing its own system of waterworks for supplying water that was to be supplied under a valid and binding contract with the water company for such purposes; thus incurring large expenditure for something that the city does not need because already supplied with it. It is to be supposed that in authorizing incorporated cities and villages to contract with a corporation for its water supply, the Legislature must have contemplated well known business conditions. It is a matter of public knowledge that in establishing a system of waterworks the company would necessarily incur a large expense in the construction of the power-house and the laying of its pipes through the streets, and as the life of the contract is limited, business considerations would naturally lead the water company to desire to protect itself from competition as far as possible; and that such company naturally would not care to enter into a large undertaking of this character unless it could by fair and legitimate provisions in the contract be protected against the possibility that the city might enter the field and embark upon competition which would be ruinous to the company and thus practically extinguish the rights the city by such contract had granted to the company. It is well known that in small towns such as Dawson (and such towns constitute the vast majority of the cities and towns in Georgia), it is wholly impracticable to successfully operate more than one waterworks system at the same time. It will be seen

that the city has itself recognized this fact, and only embarked upon its purpose of constructing a waterworks system of its own, after it had declared by ordinance that it would no longer be bound by or carry out the provisions of the present contract.

The money necessary to construct the waterworks was raised by the issue and sale of bonds for that purpose. This fact was known to the city. In the original ordinance of February 21, 1890, constituting the contract between the parties, the city agreed to pay the hydrant rentals to the Dawson Waterworks Company or to such trust company as the Dawson Waterworks Company might elect or decide upon as the trustee for its bonds. After the contract was accepted by Bennett, Bennett assigned the same to the American Pipe Manufacturing Company, the city of Dawson expressly consenting to the transfer, and later the Dawson Waterworks Company was duly chartered for the purposes specified in the contract, and the contract was by the American Pipe Manufacturing Company duly assigned to said Dawson Waterworks Company. When the American Pipe Manufacturing Company purchased the contract from Bennett, it addressed to the city council of Dawson a communication stating that it had purchased the franchises of R. L. Bennett to build waterworks in the city and asking for an extension of sixty days to beg in the work, in order to have time to market the bonds. The city adopted a resolution granting an extension of sixty days for that purpose, reciting in the resolution that the sixty days had been asked "in order to get time to market bonds." (Printed record, page 306.)

It appears that an arrangement was made whereby it was agreed on behalf of the proposed company that as soon as the works were completed, the Dawson Waterworks Company was to issue bonds in the amount of $40,000.00, secured by mortgage on all its property, including its franchises under the aforesaid waterworks contract, and the aforesaid hydrant rental of $2,000.00 per annum; and that said bonds were to be turned over to the American Pipe Manufacturing Company in consideration of the money which said Pipe Company was to furnish to construct the works, that the money necessary

to construct the works, to wit, $40,000.00, was furnished by the American Pipe Manufacturing Company under this agreement, and the Bonds were duly issued and turned over by the Dawson Waterworks Company to the American Pipe Manufacturing Company for whom they were sold. The Columbia Avenue Savings Fund Safe Deposit Title & Trust Company was selected to act as trustee. It is a trust company of high character, and before consenting to act, the president of the company undertook to make a thorough examination in order "to judge whether it was a reputable, proper and good business transaction." For that purpose he went to Dawson. The mayor and city council had been advised of the purpose of the visit. The mayor and the members of the city council met him in carriages and went with him all over the town; they showed him the source of supply; the different parts of the system were pointed out; he met various representative citizens and interviewed the people of Dawson. Everybody was thoroughly pleased with the system of waterworks and the method adopted to give them a water supply. The legal questions were investigated and satisfactorily reported upon. The president of the trust company, upon returning home, took the matter up with the board of directors, and it was determined that it was a reputable and safe business transaction, and that the company could afford to take charge of and recommend the bonds. The company accepted the trusteeship, recommended the bonds, purchased a large block of them itself, and the others were all sold to various purchasers of high character and standing, of which a list appears in the record. The bonds were sold at what is shown to be an exceptionally high price for securities of that character, particularly Southern securities. (See in particular testimony of J. K. Cuming, pages 706, et. seq. of the Printed Record.) That visit was in August 1891. The mortgage and bonds were made and dated September 1, 1891, and the bonds were sold, most of them, within a few months thereafter. Those first sold brought 92½ and some of them were afterwards sold at 100. The mortgage or trust deed covers all the real estate and personal property, the rights

and franchises, privileges and appurtenances of the Dawson Waterworks Company, together with improvements, rents, income, earnings, issues, profits, etc., and in particular "any and all income now or hereafter payable to the said Dawson Waterworks Company under any agreement made between the said company and the city of Dawson, Ga., aforesaid, or payable under any ordinance of the said city, and also any and all income now or hereafter payable to the said company under any agreements that may be made between it and any other corporations, individuals or partnerships.

With reference to the payment of interest on the bonds, the mortgage contains the following provision:

> "The yearly rental which the city of Dawson, Georgia, binds itself to pay in accordance with the terms of the franchise granted by the said city February 21 1890, amounting in the aggregate to $2,000.00 per annum, payable semi-annually, (shall be) paid into the hands of the trustee of the mortgage bonds for interest purposes on said bonds, and in case the city of Dawson contracts to increase the number of fire hydrants, the income or yearly rental shall also be paid into the trustee's hands for said purpose of paying interest upon the first mortgage bonds, and should there be any money received by the trustee from said sources in excess of the amount required to meet interest on the bonds, such excess shall be returned to the Treausurer of the Dawson Waterworks Company." (Printed Record, pages 298-299).

It appears from the evidence that the bonds were recommended by the trustee, and purchased in reliance upon the contract with the city; that the fixed rental of $2,000.00 for fire protection, being within $400.00 of the interest charged, and the other features of the contract between the Waterworks Company and the city, gave the bonds their value, and the bonds were purchased upon the strength of the contract with the city and in the belief that the city would in good faith carry out the contract. (See testimony of J. K. Cuming, pags 733, 734, 735, 736; testimony of Penrose D. Curtis, page 752; H. E. Hooper, page 753, Printed Record.)

The American Pipe Manufacturing Company having completed the works for the Dawson Waterworks Company, and being ready to turn the same over to the Dawson Waterworks Company to be operated by that company in carrying out its contract with the city, the city was so notified, and a thorough test was had by the city. Upon such test it was found that the works fully came up to the requirements of the contract, and the system was accepted by the city by ordinance as follows:

> "After testing the waterworks a formal acceptance in writing was made to the American Pipe Manufacturing Company and the following was ordered to be entered upon the minutes, viz.:
>
> "'The city council of Dawson, Ga., hereby accept from American Pipe Manufacturing Company, successars to R. L. Bennett & Co., the system of waterworks as fully complying with contract of R. L. Bennett & Co., and afterwards transferred to American Pipe Manufacturing Company. After fully testing the system, the same is hereby accepted from this date, in full compliance of said contract and in many particulars exceeding contract and none being less than called for in contract.'" (Printed Record, page 307.)

The works being completed and accepted by the city, the service and fire protection contracted for were furnished by the waterworks company, and the city on its part regularly and punctually paid the semi-annual installments of water rent as the same fell due for about three years. During that time it is shown by the uncontradicted evidence that the service was entirely satisfactory. No record was kept of the number of fires occurring during that time, and the number can only be arrived at by approximation. Later, when there was such record kept, it appears from the report's of the fire department, that the average number of fires to which the fire department was called, and the water used, was about twenty per year, and as the city had not varied greatly in population during this time, it is fair to assume that this would not be far from the average number of fires occurring yearly during the latter half of 1892 and 1893 and the first half of 1894. At none of these various fires during

that time was there any failure of pressure, nor was there during that time any complaint as to the quality of character of the service in any particular. Notwithstanding the bitterness injected into the case by the stubborn and protracted effort of the city to repudiate its contract, and the strong personal, partisan bias of the witnesses intent upon breaking the contract, not a witness recalled, or thought that he recalled, a single fire during that time at which the pressure was not in every way up to the requirements of the contract and absolutely unexceptionable.

Before the American Pipe Manufacturing Company purchased Bennett's franchise, they wished first to ascertain whether the source of water supply was satisfactory, and so wrote the city. The city thereupon selected the four places which seemed most likely to be suitable, and sent samples of the water from each to Prof. H. C. White, State Chemist, for him to analyze. Of him the mayor (himself a physician of high standing) writes: "I will say Prof. White's analysis will satisfy all concerned. He is the peer of any man in his profession." (Letter of W. B. Cheatham, M,D., Mayor, to American Pipe Company, of March 4,1891, page 308 of Printed Record.)

On March 14, 1891, the mayor wrote a letter to the American Pipe Manufacturing Company, enclosing analyses of the waters made by Prof. H. C. White, the State Chemist, and also a resolution of the city council as follows:

> "Mayor Cheatham submitted report on analyses of water by Prof. White of Athens, Ga., upon which the following resolution was passed and unanimously adopted:
>
> "'Resolves that the water supply from either or all of the places where sample of water was taken, for analysis made by Prof. H. C. White, namely, number one, spring at Dunn Spring; number two, creek above bridge; spring three, at James Lee's, and spring four, on Dr. Farrow's farm, is accepted as supply for water to fill contract and franchise granted R. L. Bennett and associates.'" (Printed Record, pages 309, 310, 311, 306.)

On March 17, 1891, shortly after receiving the mayor's letter and enclosures, the Pipe Company purchased the fran-

chise. Of the four sources, all equally good according to the analyses, that one was selected which was alone of amply sufficient quantity. It does not appear that any other source equally good, when both quality and quantity are considered, existed then, or exists now. It appears that the quality of water furnished was entirely satisfactory to the city and its inhabitants.

The stockholders, directors and officers of the Dawson Waterworks Company are residents of Philadelphia, Pennsylvania. They have no officer or representative at Dawson, except a local superintendent.

The city, as shown by the correspondence in evidence, recognizes, and has always recognized, that all business matters that arise are dealt with and determined at the Philadelphia office, and all complaints made to the Philadelphia office are promptly attended to.

No complaint was ever made as to the quality of the water. No request was ever made for filtration, or anything looking to the improvement of the quality. No dissatisfaction existed during this entire time as to the wholesomeness or purity of the water. At the time the source of supply was adopted, the analysis furnished by the State Chemist showed that the water was "Faintly turbid, slightly colored by vegetable matter in solution. Slightly organic sediment on standing. Organic impurity slight and entirely unobjectionable. A pure, safe water."

The general superintendent of the company made occasional visits to Dawson, and while there saw and consulted with the mayor, members of council and various consumers of water. No dissatisfaction whatever existed. No improvement or change was suggested.

On September 7, 1891, less than one month after the waterworks were accepted by the city, and the company began to furnish water, the city caused to be passed by the General Assembly an act entitled "An Act to Protect the Water Supply of the Waterworks of the City of Dawson and Providing Police Protection, and for other purposes." (Printed Record, pages 271, 272.) By this act police supervision of the city of Dawson was extended over the territory embraced in the water shed, and the

city was fully empowered to take all necessary steps for its protection, and this law is still of force.

On June 27, 1894, the City Council of Dawson passed an ordinance as follows:

> "The matter of purchasing the Dawson waterworks was next considered. Several letters and answers relative to same were read and considered, and after thoroughly discussing the same, Alderman Davis introduced the following resolution:
>
> *Resolved*, That the city of Dawson decline to carry out the contract as to water for city purposes of the former council with the Dawson Waterworks Co., and that a committee be appointed to make such arrangements as will be satisfactory with the Council and Waterworks Co."

At the time this ordinance was adopted, negotiations were pending between the city of Dawson and the Dawson Waterworks Company, looking to a purchase of the waterworks system. These negotiations began in May, 1894. At that time J. H. Dawes, General Superintendent of the company, was in Dawson on one of the visits that he made from time to time to the city. While there he was approached by the Mayor, who stated to him that it was the desire of the city to own and operate its own waterworks system, believing that they could operate it more economically than they could purchase fire protection from the company, and asked that the company fix a price at which it would sell the plant to the city. Mr. Dawes stated to him that when he returned to Philadelphia he would take the matter up with the company, and the company would write him regarding the sale; that it was always the wish of the persons who owned the stock control of the Dawson Waterworks Company, whenever a city wished to own and operate the system, to sell.

On his return to Philadelphia, the waterworks company, through its treasurer, wrote a letter to the mayor, dated May 31, 1894, referring to the conversation with Mr. Dawes, and suggesting that the city address a letter to the Dawson Waterworks Company embodying what it desired, so it could be laid before

the board of directors, stating that the company would consider the question, and answer fully, and further stating that it was the sentiment of his company, where a town preferred to own and operate its waterworks, to meet its views whenever possible.

On June 5, 1894, the city, through its mayor, wrote to the Dawson Waterworks Company a letter stating that it was the wish of the city to own and operate the waterworks, and with this in view, it would be pleased to know at the company's earliest convenience the best terms and price at which the works could be secured by the city. To this letter the company replied as follows:

> "Mr. A. J. Baldwin, Mayor, Dawson, Ga. Dear Sir:—Your esteemed favor of 5th requesting us to name a price for the Dawson waterworks was received two days after our monthly meeting of our board. We will lay the communication before them on the next regular meeting of our board early in July.
>
> "The works can only be disposed of subject to the bonds issued on them, amounting to $40,000.00 at 6 per cent. I do not see how it will be possible for your city to obtain what you now have, if you buy the works, for the same amount it now costs you per year, because we can not get sufficient income to pay interest, fuel, wages and taxes."

In reply to this letter the city passed the resolution of June 27, 1894, above quoted.

The finding of the Master on this point is as follows:

> "In repudiating its contract with the waterworks company the city did not base its claim upon any inadequacy of supply, inefficiency of service or quality of water furnished by the water company. The system had been in operation for three and one half years, its water supply being derived then as now from the sources designated and approved by the city. During these years the surface washings from adjoining hills flowed into the stream during times of rain, and on such occasions the water was muddy. There was no request on the part of the city for the waterworks company to supply protection to the water shed other than as existed then and now; nor was any request

made that the water be filtered, or that the water tower be increased in either height or capacity. The city predicated its right to renounce the contract upon the ground of a want of authority in the preceding administration to bind the city by such a contract, for that it created an indebtedness forbidden by the constitution of the State. The evidence makes it clear that the city was moved to this action, not only because it considered that it had the right so to do, but also because the contract was regarded as unfair and exorbitant. The facts and surrounding circumstances disclosed the evident purpose on the part of the city to either purchase the waterworks at a price satisfactory to it, or to make new agreements on more favorable terms for use of the water from year to year, or to construct and operate its own system of waterworks." (Record page 92.)

These facts so found by the Master, are undisputed. The Mayor and the majority of the members of Council who passed the ordinance, testified as witnesses. It was not claimed by them or either of them that any dissatisfaction or complaint, or cause of complaint, existed at the time. The resolution of June 27, 1894, repudiating the contract, was adopted at the next meeting of Council held after the letter from the Waterworks Company was received in which it was stated that the works could only be purchased subject to the issue of $40,000 of bonds thereon.

It appears that the city, before hearing from the Waterworks Company as to the price, had planned to raise money to purchase the works by a bond issue, and wished to limit the bond issue to $35,000 out of which it was expected to use $10,000 in constructing an electric light plant, and the remaining $25,000 in the purchase of the waterworks. It was expected that the ordinance repudiating the contract would lead to a reduction by the Waterworks Company of the price at which the company and its bondholders would be willing to sell.

On the same day that the resolution was passed, the City of Dawson, through its committee appointed for the purpose, addressed to the Dawson Waterworks Company a communication as follows: (Record p. 318):

DAWSON, GA., June 27.

Dawson Waterworks Company, Philadelphia, Pa.

GENTLEMEN: The City Council of Dawson at their meeting this day has determined not to continue the contract with your company, by which the city pays two thousands dollars per annum for water. Therefore we write to notify you that the City Council will not be bound by any contract heretofore made with you for water. We would be glad for you to send a man here to confer with us and let us come to some agreement by which the friendly relations of the past can be continued.

Yours very truly,

W. H. DAVIS,
Chairman Committee.

The Dawson Waterworks Company, on June 28, 1894, before any notice was received of the city's action in repudiating the contract, wrote to the Mayor of Dawson, as follows: (Record p. 316):

PHILADELPHIA, June 28, 1894.

Mr. A. J. Baldwin, Mayor, Dawson, Ga.

DEAR SIR: Our board of directors met yesterday. Your communication was laid before them, and passed a resolution authorizing me to offer you the Dawson Waterworks, which is represented entirely by stock, it being a duly incorporated company, at the rate of 10 per cent. on its par. The Company has outstanding $40,000 of bonds, bearing 6 per cent. interest, and none held or owned by this company, and its capital stock is $40,000, and this we offer to you and propose to deliver for 10 per cent. or $40,000, turning the company over to you free of all debts. The bonds of course remain outstanding and would have to be taken care of when interest is due by you. If you would prefer to retire the bonds you could possibly purchase a large number of them very close and possibly at par. If the proposition proves satisfactory, we can make the transfer at any time.

Yours very truly,

WM. S. PEROT, JR., TR."

The City replied, through its Mayor, as follows: (Record page 317):

"DAWSON, GA., July 3, 1894.
Dawson Waterworks Co., Philadelphia, Pa.

GENTLEMEN: In reply to yours of 28th, will say at a meeting of our council held on Monday evening 2d, your proposition of $40,000, and 10 per cent. addition for your waterworks was considered, and it being so far in excess of their expectations will say they can not buy. Will state also that our council has been enjoined from the payment of or issuing order for July payment.

Respectfully,

A. J. BALDWIN,
Mayor, for Committee."

In connection with the Ordinance of June 27, 1894, the City, as soon as the same could be prepared, caused a petition, in the nature of a bill for injunction, to be brought in the Superior Court of Terrell county, Georgia, by A. J. Carver, J. W. F. Lowry and T. O. Whitehard, as tax-payers of the City of Dawson, whereby the court was asked to restrain the City of Dawson from paying to the Dawson Waterworks Company the installment falling due July 1, 1894, for water used by the city under the contract for the preceding six months, or from paying for the water in the future. It is undisputed that this suit was brought at the instance and by the procurement of the City of Dawson in order to give effect to the resolution already passed by the city in repudiating the contract, and was prosecuted in the name of the plaintiffs by the salaried City Attorney of the City of Dawson, ostensibly to restrain his client who was paying him to procure the injunction against it. The injunction was granted on June 29, 1894. In this friendly suit an injunction was only asked against paying for the water furnished the city for fire protection. There was no prayer to restrain the city from using the water so furnished. While this suit was pending the City of Dawson continued to use the water exactly as theretofore. Upon the hearing the absurdity of restraining the city from paying for services which both the plaintiff, acting on behalf of the city, and the city itself contemplated that the city should continue to receive and enjoy, was apparent to the court, if not to the city and the friendly plaintiffs, and the injunction

was refused. These facts are none of them denied. (Record p. 409).

On July 3, 1894, the Waterworks Company having received notice of the injunction, wrote the Mayor, inquiring "if the city intends to take the side of sustaining an honorable contract, or do they propose to try to repudiate it." (Record pp. 316, 317).

To this inquiry, the city, through its Mayor, replied as follows: (Record p. 317):

DAWSON, GA., July 6th, 1894.

MR. WM. S. PEROT, Jr., Tr., Philadelphia, Pa.:

DEAR SIR: In reply to yours of 3d, I note your remarks saying "after you induced us to spend over $40,000 there." If you mean by "you" that it was either myself or any of the present board that induced you in any manner to make the investment, you are mistaken in the matter, for as I understand it this board was elected by parties opposing the contract made by former council, not that they opposed waterworks, but the terms and price they think exorbitant.

The contract you refer to is not a contract made by this council but by a former council, and this council does not feel morally bound to carry it out; it is simply a legal question. If you are unfortunate in making an illegal contract you have only yourselves to blame. As to the amount due July 1st, $1,000.00, will say this council would have drawn warrant for same but for the injunction. As our committee wrote you this council would decline to carry out contract of former council further than July, 1894. We hoped that we might get proposition from you to furnish us water at a price which we felt the city would be able to pay. I assure you that this council will not repudiate any legal contract.

Yours very truly,
A. J. BALDWIN, Mayor.

It will be seen that the only complaint the city had to make was that "the terms and price they think exorbitant." It will be seen by a comparison of the price charged for hydrant rental that so far from being exorbitant the price is less than that in the various reported cases, even where the number of hydrants was much greater than those furnished the City of Daw-

son. The prices charged private consumers were extremely reasonable, being in fact considerably less than the rates allowed by the contract. Attention, however, is called to the city's contention, as showing that there was up to this time an entire absence of complaint or dissatisfaction as to the adequacy of supply, efficiency of service, or the quality of the water furnished.

The city having thus failed in its plan of continuing to enjoy the use of the water while being restrained by injunction from making payment therefor, changed its mode of procedure.

Having submitted itself to the jurisdiction of the court, and by its answer offered to carry out the judgment of the court, and the court having, upon the hearing, refused the injunction seeking to restrain the payment of the installment falling due July 1, 1894, the city paid that installment. Adopting the suggestion found in the decision of the Supreme Court of Georgia in the case of Cartersville Improvement, Gas and Water Company *vs.* Mayor and Aldermen of Cartersville, 89 Ga., 683, that a contract of this character, entered into without the preliminary sanction of a popular vote, is good only as a contract from year to year and that either party can terminate it at the end of any year, but so long as the citizens and the city receives the services contracted for, it must pay for such service, the city decided to plant itself upon the proposition that it was liable only up to the end of the current year, 1894, and not thereafter. Instead, however, of paying the full one thousand dollars, the city undertook to assess against the water company city taxes for the years during which the waterworks had been in operation, and deducted the amount of such taxes from the thousand dollars, paying the balance to the water company. As will be pointed out more fully hereafter, the contract stipulated that the water furnished by the water company to the city for its public municipal buildings and street fountains should stand in lieu of taxes, and in furnishing the water for such purposes the company had already in substance and effect paid the taxes. The same case in 86 Ga., 683, relied upon by the city to support its contention that the contract was only good as a contract from year to year, holds that a stipulation that services of this char-

acter shall be received by the city in lieu of the payment of taxes is valid.

We shall not at this place discuss the case of Cartersville Improvement, Gas and Water Company *vs.* Mayor and Aldermen of Cartersville, 89 Ga., 683, further than to say that it was rendered two years and a half after the contract was entered into, and subsequent to the expenditure of all the money arising from the sale of the bonds in the construction of the waterworks plant. It is what is known as a "head note decision," that is to say, a decision in which the court filed no opinion. As will be seen in the discussion further on in the brief, the decision of the Supreme Court of Georgia upon this subject fluctuated greatly between that date and the decision of the case in 106 Ga., 696, decided seven years later.

It will be seen from the Cartersville cases, 89 Ga., 683 and 689, it is distinctly held that so long as the city continues to accept the benefit of the service furnished under the contract, it must pay for it. This was again held in the case of Dawson Waterworks Company *vs.* Carver, 95 Ga., 565, being the decision of the Supreme Court of Georgia in the above mentioned injunction case brought by Carver, Lowry and Whitehard to restrain the city from paying for the water it had already used. When this last case was decided the court was not prepared to hold that such a contract was invalid as creating a "debt," the decision being as follows:

> "There was no error in refusing to enjoin the payment by the city for the water it had already consumed, whether the contract between it and the waterworks company for the full period contemplated thereby was valid and binding upon the city or not; but at the hearing of the application for the interlocutory injunction, the question of the validity of this contract for future supplies of water was not properly for determination, and therefore nothing stated with reference to this question in the order passed by the presiding judge is conclusive upon the parties."
>
> 95 Ga., 565, Dawson Waterworks Co., *vs.* Carver, *et al.*

On October 4, 1894, before a decision had been rendered by

the Supreme Court in the case of Dawson Waterworks Co. *vs.* Carver, *supra*, the city passed an ordinance calling for an election to take place on November 14, 1894, to determine by a vote of the qualified voters of the municipality whether the city "shall issue bonds for the purpose of buying or erecting waterworks." (Record p. 326.) It was the expectation of the city that a decision would be rendered by the Supreme Court as to the validity of the waterworks contract prior to the date fixed for the election. On November 5th, 1894, it having become apparent that a decision of the Supreme Court would not be rendered prior to November 14th, the date fixed for the election, an ordinance was passed calling off the election for November 14th, and ordering the same for December 12th, 1894. The decision of the Supreme Court was rendered November 26th, 1894.

As it decided nothing as to the validity of the contract, the city proceeded to hold the election on December 12th, 1894, but determined not to actually issue the bonds authorized by the vote at such election until the city could thereafter invoke a decision by the court upon the question whether the existing contract was valid or otherwise. The city, therefore, on December 14th, 1894, two days after the election was held, and on the day immediately succeeding the night of the council meeting at which the result of the election was certified by the managers, through its Mayor, addressed to the American Pipe Manufacturing Company a commu nication as follows (Record p. 497):

Dawson, Ga., December 14th, 1894.

American Pipe Manufacturing Co., Philadelphia, Pa.:

Gentlemen: The contract entered into between the City of Dawson being illegal it will require annual contracts. By direction of the city council of Dawson, I write to know what your company will charge the city council of Dawson for the use of water in the same way heretofore used by them from January 1st, 1895. We think the amount heretofore charged is entirely too much per annum, in fact, exorbitant. If your company will make reasonable terms we will enter into a contract with you

for one year from January 1st, 1895. If we can not agree you will please consider this as notice that this council will not longer be liable under your contract after January 1st, 1895.

A. J. Baldwin, Mayor.

The Dawson Waterworks Company replied to this letter, calling attention to the fact.

"That the contract which was entered into between this company and the City of Dawson was done in good faith, and as far as we are concerned was fully and honestly complied with, and that we have ever since fulfilled our part of the agreement in each and every particular; and that we fully believe that our contract with your city is a legal one; and that the charge made to your city for hydrant rental is an extremely reasonable one."

And in this letter the company state that:

"We shall continue to maintain our fire pressue in future the same as in the past, and your city fire department will find our fire hydrants ready for servive whenever they may be required; in fact always ready for use. We shall present our bills for hydrant rentals to your city when due, and shall expect the city to pay same."

Record p. 431

The city declined to pay for the water furnished during the year 1895, as well as during all subsequent years. The contract required that the city make provision for the annual payment of said hydrant rentals by levying a tax for that purpose upon the taxable property of the city. This the city refused to do, planting itself upon the ordinance, that it was not bound by the contract and would not carry it out.

During these various years fires occurred, at all of which the water was used, with the city's knowledge and by its authority by the fire deparment existing and acting under an ordinance of the city, and using the city's hose, reels, spanners, and other fire apparatus. By the use of the water not only was insurance rates greatly reduced, but many thousands of dollars of valuable property has been saved. At one particular fire the water

used prevented the spread of a conflagration which would have destroyed practically the entire business portion of the city, property worth some $250,000, or about one fourth of the entire taxable value of all the property contained in the city.

The hydrant rentals falling due July 1, 1895, and January 1, 1896, covering the use of the water for the year 1895, were presented for payment by the waterworks company to the appropriate city officials, and shortly after January 1, 1896, an action at law was brought by the Dawson Waterworks Company against the City of Dawson for the recovery of $2,000, the amount of said hydrant rentals for the year 1895. Inasmuch as in the Cartersville cases (89 Ga. 683, 689, *supra*) relied on by the city as supporting its contention that the contract was invalid as creating a debt, it was distinctly ruled that if the city continued to use the water it must pay for it, and in the case of Dawson Waterworks Co. *vs.* Carver, 96 Ga. 565, *supra*, it was further ruled that so long as the city continued to use the water for fire protection it must pay for it, and the question of the validity of the contract could not arise for decision, in order to accomplish its purpose of invoking a decision that the contract was invalid, it was necessary for the city to assume the position that it was not using the water. The city, however, well knew that the city could not afford to be without fire protection during the time that might intervene before a final decision could be reached in the case. The election of December 12, 1894, had been carried for the issue of bonds upon assurances that the people of Dawson would enjoy fire protection until such time as the city could purchase the waterworks, or erect its own system. The citizens of the town would never submit to being left without fire protection during the time; the insurance companies would increase rates; and the Mayor and council did not care to face the issue of leaving all the property within the city without any protection from fire. While, therefore, the mayor and council "officially" ordained that the city was not using the water, the same mayor and council, and all of the officials of the city, as well as citizens, united in bringing it to pass that the water should be used precisely as theretofore. Within a very

few weeks after the city had solemnly proclaimed that it would not further use the water, at the first fire which occurred, the fire department, in the presence of the mayor and various members of the council, used the water with apparatus belonging to the city and furnished them by the city for the purpose. The mayor himself in person handled the hose and pointed the nozzle that directed the chief stream upon the fire.

The city ordinances prescribing the duties of the chief of the fire department, and the officers and members of the different companies composing the fire department, remained unrepealed. Those ordinances empowered the fire companies, and made it their duty, to take charge of the engine, hose, and other apparatus which belonged to the city, and directed that they should be used in extinguishing fires, and provided various penalties for a violation of the ordinances. One of the offenses for which punishment was provided was "the use of said implements except for the benefit of the city."

With the knowledge of the Mayor and Council, and under valid ordinances of the city, the fire department used the apparatus in the extinguishment of various fires with the water furnished by the waterworks company under its contract for that purpose, and with the city's knowledge that it was being furnished under the contract, and that the waterworks company would expect pay therefor as provided by the contract. The city not only furnished to the different fire companies hose and other apparatus for the purpose of using this water, and with full knowledge that there was no other water which could be used, but during the time bought additional hose and other apparatus needed in using the water. No other source was provided by the City Council, and no other water existed that could have been used; the few cisterns that had existed before the waterworks were constructed had most of them fallen into disrepair, and the water in such of them as would hold water was water furnished by the waterworks company for that purpose under its contract. The engine that had been used in raising the water out of the cisterns so as to throw streams upon a fire was out of repair and very seldom used, and the city

ceased to employ an engineer to run it, but relied upon the pressure furnished by the waterworks company. It was of course known to the city that if any water were in the cisterns it could not rise up in the hose against gravity, and the hose which it was the duty of the fire department to use could only be employed in the use of water under sufficient pressure furnished by the waterworks company. The persons belonging to the various fire companies received for their service exemption from street taxes by order of the mayor and council representing the city in its official capacity. This continued during the time that followed the city's repudiation of the contract exactly as theretofore. Two of the three fire companies kept up their regular organization, held regular meetings, elected officers, were governed by by-laws, and complied with the ordinances of the city ordained for their government. The other fire company still turned out at the various fires; its members were still exempted from street taxes, and were still furnished by the city hose and other apparatus for extinguishing fires.

Not to go more into detail on this subject, we quote from the Master's finding as follows: (Record p. 90):

> "The water has been continuously used on the occasions of numerous fires and whenever so required. The city claims that notwithstanding that its officials participated in this use of the water, their action was that of any citizen in an emergency, and was not authorized by the city in its corporate capacity.
>
> I find that the city fire organization was maintained during the years following 1894 as it was in preceding years. While at times this organization was not in an efficient state, it was never disbanded. The city continued to furnish hose and fire apparatus and to grant to members of fire companies exemption from municipal street taxation. No other means for fire protection was afforded by the city, so that it must have been recognized that in any emergency of fire resort to the use of the water of the waterworks company was necessary and inevitable. The city did not forbid the use of this water by its fire department, and must have known that it was being continuously so used.

In 1898, prior to the filing of this bill, the city brought its fire department up to a higher state of efficiency with a paid chief at its head.

I accordingly find that notwithstanding the city had repudiated the contract, it has continued to enjoy the fire protection afforded by the waterworks company and to use the water for that purpose on every occasion, in the same manner and to the same extent that it did prior to its repudiation of the contract."

Notwithstanding these facts, the city, in order to put itself in a position to question the validity of the contract, in its answer to the action brought by the Dawson Waterworks Company for the collection of the hydrant rentals for the year 1895, set up as a part of its defense that:

> "In answer to the second paragraph, defendant says it is not true that the plaintiff furnished water to the city for the year 1895, for the reason that the city did not use any water during said year, and had on December 14, 1894, formally notified plaintiff that they would no longer be bound by said contract and would not use the water." (Record, page 458.)

Upon this issue the defendant went to trial, and contended both in the court below and the Supreme Court, that it had not used the water, attempting to draw a distinction between the use of the water "officially" and that kind of use of the water which puts out fires.

The case came on for trial at the November Term, 1896, of Terrell Superior Court, and the court directed a verdict in favor of the plaintiff. The City of Dawson took the case to the Supreme Court of Georgia. In the Bill of Exceptions, which the trial Judge through error certified to be true, the copy of the waterworks contract, as set forth therein by the attorneys for the city of Dawson, wholly omitted the following clause:

> "The Council shall, and they are hereby required, to make provision each year for the payment of two thou-

sand dollars as provided in the foregoing section, by levying a tax sufficient for that purpose upon the taxable property of the city."

The trial Judge, to whom the bill of exceptions was tendered by the attorneys for the city of Dawson, did not notice the omission but certified that the Bill of Exceptions truthfully set forth the evidence in the case. Under the law of Georgia there is no provision for correcting a Bill of Exceptions or challenging the truth of its recitals. In the Supreme Court of Georgia the attorneys for the city of Dawson urged as a reason why the case should be reversed, that it did not appear from the contract set out in the Bill of Exceptions that the city made provision for the payment of the hydrant rentals, that the contract was therefore invalid under paragraph 1, section [illegible] of the Constitution of Georgia. The case was reversed solely by reason of the fact that the attorneys for the city of Dawson had thus omitted from the contract a material portion thereof, and afterwards had urged in the Supreme Court that the contract was void because the provision thus omitted did not appear to have been contained therein. The decision of the Supreme Court of Georgia is in the following words:

"This being an action against a municipal corporation for a year's supply of water, in which the plaintiff's right of recovery depended upon the validity of an alleged contract between it and the defendant, covering a period of years, and the evidence not affirmatively disclosing that when the contract was originally made the municipal corporation had, in the manner prescribed by the Constitution of this State, made due and lawful provision for the payment of the yearly sums to become due on such contract, it was error to direct a verdict for the plaintiff."

102 Ga. 594, Mayor & Council of Dawson *v.* Dawson Waterworks Co.

The case thus being reversed and sent back to be retried, the plaintiff on the second trial again introduced the same evidence;

it being agreed that the report of the testimony on the former trial should be offered in lieu of calling witnesses to again testify. (Record p. 418.)

The court again directed a verdict in favor of the plaintiff against the defendant, construing the decision of the Supreme Court as holding that the direction of the verdict on the former trial did not appear to be erroneous for any other reason than that assigned by the court in the opinion above quoted.

The City of Dawson again carried the case by bill of exceptions to the Supreme Court of the State.

The questions dealt with by the Supreme Court of Georgia the second time the case came before that court, and the rulings made, will appear from the opinion of the court in that case, found reported in

106 Ga., pages 696 to 737. City Council of Dawson *vs.* Dawson Waterworks Co

The court in that case have this to say as to the decision rendered by the same court the first time the case was before them :

> "When this case was here before, (102 Ga. 594), it was ruled that, 'This being an action against a municipal corporation for a year's supply of water, in which the plaintiff's right of recovery depended upon the validity of an alleged contract between it and the defendant, covering a period of years, and the evidence not affirmatively disclosing that when the contract was originally made the municipal corporation had, in the manner prescribed by the Constitution of this State, made due and lawful provision for the payment of the yearly sums to become due on such contract, it was error to direct a verdict for the plaintiff.' There is nothing in our present ruling which conflicts with this decision. Upon an investigation of the case as then presented, it was found that one absolutely essential element necessary to constitute a cause of action was wanting, and the case was reversed because the direction of a verdict for the plaintiff was erroneous for that reason. There was no ruling made on any of the questions now decided, although such questions were made in the record. The record in the case did not disclose an ordinance which made provision for the debt, and if all of the other consti-

tutional and statutory requirements had been fulfilled, the absence of this ordinance would have required a reversal of the case. The extent of the ruling in that case was simply that without such an ordinance there could be no cause of action, and whether the other elements necessary to constitute the cause of action were present was not passed upon."

Ib. 106 Ga., page 735.

[Printed Record in this case, pages 491, 492.]

The contention that the city used the water, and therefore should pay for it, the court disposed of by holding that this was a jury question, the court saying: "While the great preponderance of the evidence is in favor of such finding (that is, the finding that the city used the water), there is some evidence upon which a jury could base a finding in favor of the defendant, and we think the case should have been submitted to a jury under proper instruction."

Ib. 106 Ga. page 736 of the opinion.

(Printed Record in this case, page 492.)

This is in keeping with the rule so frequently announced and carried to such extreme lengths in this State, that the court can not direct a verdict where there is any conflict, however slight, and can not even apply to the evidence in determining such question the rules of common sense. If a party makes any contention, however absurd, and goes through the form of offering a witness or witnesses who are permitted to testify on the subject, our State courts hold that the case should be "submitted to a jury under proper instruction." And as to what are "proper instructions," the rule in our State is:

> "It is error for any or either of the judges of the Superior Courts of this State in any case whether civil or criminal or in equity, during its progress, or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved. . . . ." (Code of Georgia, Section 4334.)

The court, therefore, sent the case back to the lower court

to be again tried. There has been no final trial or judgment rendered in the cause. The ruling of the court touching the question raised by the defendant's answer, that the contract for water supply was invalid as creating a debt, is stated in the first syllabus (in our State prepared always by the court) as follows:

> "Without the preliminary sanction of a popular vote as required by the Constitution, a municipal corporation can not contract for a supply of water, on the credit of the city, for a longer period than one year; and a contract which by its terms is to run for twenty years, each year's supply to be paid for semi-annually from year to year, is operative from year to year so long as neither party renounces or repudiates it. Cartersville Improvement Co. *vs.* Cartersville, 89 Ga. 683; Cartersville Water Co. *vs.* Cartersville, 89 Ga. 689; Lewis *vs.* Lofley, 92 Ga. 804; Habersham County *vs.* Porter Mfg. Co., 103 Ga. 613, followed and approved; Spann *vs.* Webster County, 64 Ga. 498; Cabaniss *vs.* Hill, 74 Ga. 845, overruled in part." (Ib. 106 Ga. 696, Syllabus I.)

It will be noted that all of the cases followed and approved are cases decided subsequent to the time that the contract in the present case was entered into and the money expended and the works constructed under the contract, and the bonds, all of them, purchased for value by persons who relied upon the validity of the contract and the good faith of the city in carrying the same out. Two cases, decided before the contract was made and which are in hopeless conflict with the decision now under discussion, are overruled. Another case not referred to in the syllabus, namely: Butts *vs.* Little, 68 Ga. 272, the court disposes of by saying that the case was overruled in Lewis *vs.* Lofley, 92 Ga., 804, decided in 1894, some three years after the contract was entered into. The case of Butts *vs.* Little, 68 Ga., 272, decided in 1881, and which remained unchallenged until after the present contract was entered into, went even further than it is necessary to go in the Dawson Waterworks case in order to uphold that contract. In that case a county entered into a con-

tract to build a court house, to be paid for as the work progressed, less 15 per cent. and the balance at the date when the work was completed. The cost of the court-house, to wit, $24,495.00, was largely in excess of any amount that could be raised by taxation during the year it was to be paid for. The court held that while such obligation, to be paid for in a single year, largely beyond the possible revenues of that year, was illegal, yet "if the parties to this contract can so modify it that the cost of this building can, as it falls due, be met annually hereafter by a levy of one-fifth of 1 per cent. on the assessed value of the taxable property of said county, the injunction ordered may be altered so as to meet this modification."

68 Ga., page 280 of the opinion.

The case of Mayor of Rome *vs.* McWilliams, 67 Ga., 106, the court did not deem necessary to overrule or even to refer to, for the reason that the same was a decision rendered by two judges and not by the full bench of three judges, and under the Georgia law decisions rendered by two judges, while binding as a precedent until some later decision conflicts therewith, yet does not fall within the statute requiring a decision by the full bench to be overruled expressly and not by implication. It will be seen that this last mentioned case not only adopts fully the view subsequently adopted by this court in Walla Walla *vs.* Walla Walla Water Co., 172 U. S., I, but cites in support thereof two cases similar in their facts to the present case. Mr. Justice Speer, speaking for the majority of the court, uses the following language:

> "An obligation arising under a contract on the part of a municipal corporation to pay for work when and as it shall be performed in the future, does not constitute or ripen into an indebtedness within the meaning of the Constitution till at least the performance of the work. 27 Iowa 228; 17 N. Y. 110.
>
> "If this were not so, then it would be impossible, in a majority of instances, to even contract for the most necessary public building without a prior levy and deposit of

money in the treasury. The obligation to pay so far as the time of its inception as between the parties is concerned, is one thing, and an actual indebtedness within the meaning of the constitution is another. I may enter into a contract for an architect to build me a house, but if he never does the work I owe him nothing; so if I pay him as he progresses, I will not be his debtor; so if I contract to pay him when the work is done, I owe him nothing till the contract is fulfilled, and if on its fulfilment I discharge it, I can not be said to have incurred a debt in the sense the Constitution prohibits corporations from incurring." (Quoted in report of Special Master, on page 100 of Printed Record.)

The conclusion finally reached by the Supreme Court in the case of City Council of Dawson *vs.* Dawson Waterworks Company was reached after many fluctuations of opinion, as will be seen by the court from an able review of all of the decisions by the Georgia Court, found in the report of the special master in the present case. (Pages 99, 100, 101, 102, 103 of the Printed Record).

Such wavering of opinion is shown, too, in the manner in which the court dealt with the question in the litigation between the city of Dawson and the Dawson Waterworks Company.

In Dawson Waterworks *vs.* Carver, 95 Ga., 565, being the tax payers' injunction suit above referred to, the court not only were unprepared to rule upon the question, whether the contract was invalid as creating a debt, as contended by the city and its three friendly tax-payers, but in order to reserve the question for future consideration, directs by its judgment that whatever was said by the lower court on the subject should not in anywise bind the parties. When the matter was first before the court, 102 Ga., 594, Mayor and Council of Dawson *vs.* Dawson Waterworks Company, the court again postponed the question, although squarely made, by reversing the case and sending it back by reason of the failure of the record to affirmatively disclose a portion of the contract which the city of Dawson saw fit to omit from the record certified and sent up to that court.

When the case came before the court the last time and was argued in October, 1898, the court was still wavering by reason of the confusion and the hopeless conflict brought about by recent decisions subsequent to the making of the present waterworks contract, and the court subseqently on their own motion directed that the case be reargued, and the decision finally reached, the court frankly say, "is in direct conflict with the decision of the highest court in the land (referring to Walla Walla) as well as with the current of American authority on the subject."

106 Ga., 714.

The court cited as directly in conflict with the conclusion reached by it, decisions of some seventeen courts, embracing nearly every important state in the Union. As tending to sustain its own decision, the court cited four cases, one of them overruled by a later decision of the same court, also cited in opinion, and another, Niles Waterworks vs. City of Niles, 26 N. W., 525; 59 Mich., 311, having been since that decision distinguished and in effect overruled by a later and carefully considered case decided by the same court, namely, Ludington Water Supply Company vs. City of Ludington, 78 N. W., 558; in which the Supreme Court of Michigan places itself fully in line with what is now the almost unbroken current of authority on the subject.

By this decision, a contract believed to be valid by the Waterworks Company, the bondholders, the city and all of its inhabitants alike when entered into, and upon which the company has expended large sums of money in giving the City of Dawson a system of waterworks which had proved altogether satisfactory and unexceptionable, and which was valid tested by what has been held to be the sounder and better view by this court and by the almost unbroken current of authority, the appellant insists, was invalidated and destroyed.

During the time that this litigation was pending between the Dawson Waterworks Company and the City of Dawson, neither

the complainant, the trustee for bondholders, nor any one of the individual bondholders had the slightest notice, information or intimation that there was any trouble of any kind. They rested secure on the rights guaranteed them by the contract and the mortgage which gave them the right to look thereto for their security. They did not know that there was any default by the City in the payment of hydrant rentals. The amount of their interest was paid over to the trustee by the Dawson Waterworks Company, and the bondholders and the trustee for bondholders believed, and had every reason to believe, that the hydrant rentals were, to the extent thereof, the source from which the Waterworks Company met its interest payments on the bonds. The trustee and the bondholders had no notice that the city was using the water and enjoying the fire protection which the contract afforded, while engaged in an effort to escape its liability to pay therefor under the flimsy and fraudulent pretense that there was a distinction between "official" use of the water and the actual use by the fire departments of the city under valid municipal ordinances with the knowledge and approval and active assistance of the city council, with the city's own apparatus furnished for the purpose at each of the numerous fires which occurred during all these years. The trustee had no notice that by such unjust and inequitable conduct the City was engaged in a stubborn and persistent effort to destroy the contract and the property values dependent thereon; an effort which would not by any possibility be successful, except by aid of the pretense that the city was not receiving and using the fire protection which, in fact, all knew it was using and enjoying to the fullest extent possible.

The City knew that the money which created this property and rendered it possible for the city to enjoy the benefits of fire protection and water for the use of its inhabitants was practically every dollar of it derived from the issue and sale of these bonds. It was so contemplated when the contract was entered into. The city actively aided in the sale of these bonds

not only by a provision in the contract that the hydrant rentals might be directly payable to the trustee for bondholders, but by extending the time of beginning the construction of the works for the express and declared purpose of enabling the other contracting party to negotiate and sell the bonds which were to furnish the money to construct the works. The City at the very moment it adopted the ordinance repudiating the contract had the fact immediately before it that "the works can only be disposed of subject to the bonds issued on them, amounting to $40,000.00 at 6 per cent."

The letter from the Dawson Waterworks Company to the mayor of the City of Dawson, pending the negotiations between the city and the Waterworks Company looking to the purchase of the waterworks, which in answer to the City's inquiry as to the probable price, reminded the City that in any purchase, the bonds must be taken care of, and that it was not in the power of the company to dispose of the works except subject to these mortgage bonds to the amount of $40,000.00, was the letter which precipitated the ordinance of June 27, 1894, repudiating the contract. It was because the amount of these bonds exceeded what the City was willing to pay that the City decided to destroy the value of this property, and thus put themselves in a position to purchase it at the City's own price. The ordinance repudiating the contract was adopted at the next meeting of council after that letter was received, and shows by internal evidence that it was based directly thereon. Yet the City, though entering into this course of conduct for the purpose of destroying the contract and the value of this property, which, to an amount greater than what the city regarded as its full value, belonged equitably to the bondholders, gave no notice to the bondholders or their trustee, but withheld from them all knowledge of the litigation intended to destroy their security. The name and residence of the trustee was known to the City. The mortgage was spread upon the public records in the City. The president of the trustee company, before his company would accept the trust, came personally to

Dawson and was shown the waterworks and the City by the mayor and council in a body, and every inducement offered that it was in the city's power to offer to cause his company to recommend and handle the bonds and place the same with its customers and clients.

The taxpayers' bill for injunction, which, it is admitted, was instigated by the City, prepared at the direction of the mayor and city council, by the salaried city attorney, by which it was sought to have the contract declared invalid, did not name the trustee for bondholders defendant, although the prime object of the suit was to destroy their security and their property. The trustee was given no notice of the suit. It was the City's purpose to destroy their rights clandestinely and without their knowledge.

The stock ownership of the Dawson Waterworks Company is held by the American Pipe Manufacturing Company. This last named company builds waterworks and controls by stock ownership a large number of waterworks companies, having contracts with municipal corporations to supply water for public purposes. For the cost of construction, the Waterworks Company in each instance issues its bonds, secured by mortgage similar to that in the case at bar. It is from the sale of such bonds that the pipe company realizes the money used by it to construct works under its contract with the Waterworks Company, or proposed Waterworks Company, or more usual, to reimburse itself for the money already advanced by it for the purpose under an agreement with the Waterworks Company that such bonds are to be issued therefor. It has sold in this way several millions of dollars of bonds of different companies which are outstanding. Several of these Waterworks Companies are located in Georgia.

When this trouble arose between the City of Dawson and the Dawson Waterworks Company, the pipe company, for business reasons, desired that the bondholders be not needlessly disturbed, and being led to believe that the contract would be finally upheld, it loaned to the Dawson Waterworks Company

from time to time the money wherewith to meet the interest falling due on the bonds. Whether or not, in strict ethics, the company was justified in this withholding from the trustee for the bondholders and the owners of the bonds knowledge of the City's conduct in repudiating the contract, it was not an unnatural course for the company to adopt from a business point of view. The Pipe Company, no doubt, supposed that it was justified in adopting this course, as any other course would have disquieted not only the owners of the bonds of the Dawson Waterworks Company, but bondholders in each of the other companies that have contracts with municipal corporations in Georgia.

The motives, however, of the Pipe Company or of the Waterworks Company are not material. The holders of the bonds purchased them for value in open market, or inherited them from persons who thus purchased. Neither they nor their trustee have any connection whatever with the Waterworks Company, or the Pipe Company, except as creditors of the first named company by reason of holding the bonds. These facts are clearly shown and are uncontroverted.

The decision of the Supreme Court in the case of City Council of Dawson *vs.* Dawson Waterworks Company, 106 Ga., 696, above referred to, was rendered March 14, 1899. The City of Dawson, upon the handing down of that decision, proceeded to carry into effect its purpose of constructing an independent system of waterworks of its own. This purpose had been formed as far back as 1894, and at an election held December 12, 1894, the voters had authorized an issue of bonds for that purpose. It was, however, promised the voters that the bonds would not be sold and the money expended till a decision could be had upon the validity of the Dawson Waterworks contract and the sale of the municipal bonds was held in abeyance pending the aforesaid litigation between the Waterworks Company and the City. The decision of the Supreme Court of Georgia being regarded by the City as a final decision of the question, the City at once entered into negotiations for the sale of its

bonds and was preparing at once to erect a system of waterworks.

As a matter of fact, the decision of the Supreme Court of Georgia, 106 Ga. 696, *supra,* was not a final determination of the question. The effect of the decision was merely to send the case back to be again tried in the lower court. Under the liberal laws in Georgia allowing amendments at any time before the jury actually retire to their rooms on the last trial, the plaintiff, the Dawson Waterworks Company, could on the subsequent trial of the case have amended its declaration and set up the contention that the waterworks contract with the City of Dawson of February 21, 1891, was, according to the State of the decisions at the time it was rendered, valid and that the subsequent ordinances of the City of Dawson were laws of the City seeking to impair the obligation of the contract, and thereby present a federal question and had the court pass upon the same; and if the decision upon the federal question when so presented had been adverse to the contention of the Waterworks Company, the case could have been brought by writ of error to this court. There was, therefore, no final decision of the matter, and there has not been any further trial or final decision in that case up to the present time.

It was, however, such a decision as satisfied the voters and inhabitants of the town of Dawson and such as they were willing to act upon in incurring the expense of erecting waterworks under municipal ownership. The aforesaid case between the Waterworks company and the City of Dawson was an action at law in the Superior Court which holds only two sessions a year. In the due course of things, it would have been impossible to have brought the question again before the Supreme Court of Georgia in less than a year, and a writ of error to this court would have taken proportionately longer. Meantime, the City would have erected its own waterworks and the irreparable damage complained of in the present bill would have been already done.

The situation presented additional difficulties. The City

having repudiated the contract, issued executions for City taxes and has placed the same in the hands of the city marshal for levy and sale of the waterworks property in disregard of the provision in the contract that the furnishing of water for the municipal buildings and public fountains should be accepted by the City as payment of taxes. And at a time when the city had invoked a decision which destroyed the credit of the Waterworks Company and largely impaired the value of its property, its property was to be levied upon and sold under municipal tax execution. A part of the taxes was levied to provide a sinking fund and interest on the municipal bonds for the erection of a rival system. As already stated, the City owed the Waterworks Company for hydrant rentals for the years 1895, 1896, 1897 and 1898, besides the portion of the hydrant rentals for the year 1894 retained by the City under its claim for back taxes, making a total of some $8,600.00, besides interest. To make good this loss of revenue and enable the Waterworks Company to meet the interest on its bonds, the American Pipe Manufacturing Company loaned to the Waterworks Company from time to time its own funds for the purpose of meeting this interest, the amounts so loaned, as shown by the evidence, up to and including March 1, 1899, amounting in the aggregate to $8,560.00. (Finding of Master, pages 93, 94 of Printed Record.) The business reasons which induced the pipe company to make these loans have been already stated.

After the decision was rendered by the Supreme Court of Georgia in the Dawson Waterworks case, 106 Ga. 696, *supra*, declaring contracts of this character invalid, the pipe company were unwilling to make further loans to the Waterworks Compay. The company was, therefore, left in a position where it was wholly unable to raise necessary funds for the payment of future instalments of interest to the bondholders, or for other necessary purposes. Its most valuable asset, namely, its contract with the City of Dawson, was wholly discredited and, for the time being at least, destroyed. The proposed competition on the part of the city, a field in which as this court well said in

the Walla Walla case, it undoubtedly would have become the master, would inevitably destroy the value of the waterworks plant, except as the material could be removed and parts sold in a dismantled condition.

At this juncture, therefore, the Waterworks Company conceived it to be its duty to apprise the trustee for the bondholders of the true situation of affairs, and do all in its power to put the trustee in a position to protect the rights and interests of the bondholders. The hydrant rentals due from the City of Dawson for fire protection for the years 1896, 1897, 1898, (being every year except the year 1895, for which the aforesaid action at law was still pending), the trustee was by resolution authorized to demand and collect, in order to reduce the mortgage debt in view of the impairment of the security, or as it was called, in order to provide a sinking fund. The contract with the city made these hydrant rentals payable either to the Waterworks Company, or "to such trust company as the Dawson Waterworks Company may elect or decide upon as the trustee for their bonds." The mortgage in express terms embraced these hydrant rentals primarily for the payment of interest on bonds, but also in express terms as security for the principal of the debt. There had been no default in the payment of interest, but a condition of affairs had come about which left the security which originally was deemed sufficient no longer sufficient for the protection of the bondholders and requiring immediate action for their protection against its further impairment. The company, therefore, authorized the trustee to take such immediate steps as might be deemed necessary That a mortgagor may before default, turn the mortgaged property, or any portion of it, over to the mortgagee for his protection, would seem to admit of no doubt; that ~~its~~ common honesty and fairness would impel the Waterworks Company to do exactly what it did do, all must concede. It is difficult to see how the city could find in this action any cause of complaint. We submit, however, that the equity of the trustee in the situation

was complete and perfect without regard to any action taken by the Waterworks Company.

The trustee for the bondholders, upon being apprised of the situation, brought the present bill.

The bill was filed on May 1, 1899, by appellee, the Columbia Avenue Savings Fund, Safe Deposit Title & Trust Company, as trustee for the bondholders, against the City of Dawson, certain individuals in their representative capacity as officials of said city, and against the Dawson Waterworks Company. The bill alleged in substance:

The Water Company on September 1, 1891, created the complainant trustee for eighty of its first mortgage bonds in the denomination of $500.00 each, and executed to complainant its mortgage or deed of trust, having as security for the payment of its said bonds all of its real and personal property, rights, franchises, privileges and appurtenances, together with all incomes, rents, benefits, issues and profits then or thereafter payable to the company and in particular its rights under the contract with the City of Dawson, and the income payable to the said company, or to the trustee for its bondholders by virtue of the contract with the City of Dawson in that regard.

The bonds are described, and a copy of the mortgage is to the bill attached. The bonds were duly issued and sold in open market to *bona fide* purchasers for value. They were issued and sold in order to procure the money with which to construct and equip the system of waterworks as contemplated in the aforesaid contract between the City of Dawson and the Dawson Waterworks Company.

The contract as contained in the aforesaid ordinance of February 21, 1891, is described and set forth in the bill, and a copy is attached to the bill as an exhibit. The terms of the contract have been hereinbefore set forth, and it is not deemed necessary to repeat the same at this point.

The bill set forth the circumstances which led up to the

making of the contract between the City of Dawson and R. L. Bennett, above referrred to, including the election of June 11, 1886, and the careful investigation into the question of what was the most feasible plan of carrying out the wishes expressed by the voters, and that the present contract was the result; that the contract was published in full in the public gazette, and was acquiesced in by all the citizens. The works were constructed at an approximate cost of $40,000.00 and was a complete and thorough system of waterworks in accordance with the specifications and requirements of the contract. The Dawson Waterworks Company was duly incorporated for the purpose of carrying out the contract. The system was fairly and fully tested by the City and was found to satisfactorily comply with all the requirements of the contract. The city council of Dawson on August 12, 1891, adopted a resolution declaring that after fully testing the system, it was accepted by the city as fully complying with the contract. The Waterworks Company continued to maintain and operate its system in full compliance with the requirements of the contract, and the city has continuously enjoyed the fire protection contracted for and for that purpose has continuously used water furnished by the Waterworks Company so often as required. It was understood and contemplated by the City at the time of entering into the contract that the money required to construct the system of waterworks was to be procured by the issuance and sale of the bonds of the Waferworks Company, and in order to render the bonds more salable, the City by said contract agreed and promised to pay to the trustee for the bondholders annual rentals stipulated in the contract, thus notifying investors to become purchasers of the bonds upon the faith that the City would observe its obligations as therein contained. The bonds were negotiated and sold upon the faith that the City would pay said rentals to be applied to the liquidation of the principal and interest of said bonds, and the proceeds of said bonds were used in construction of said waterworks system.

After using the water without objection or complaint, the city council on June 27, 1894, adopted the resolution hereinbefore set out, declining to further carry out its contract with the Waterworks Company. The Waterworks Company had in no way failed to comply with its contract, nor had any complaint been made as to the character of the service, the pressure, or the quality of the water furnished. At the time of the passage of the resolution, the City was considering the question of purchasing the waterworks plant of the Dawson Waterworks Company, and the bill charges that the purpose of the City in repudiating the contract was to destroy the value of the property by withdrawing the revenues necessary to its existence, and thus force the company to sell at such price as would be satisfactory to the City.

The bill sets forth the bringing, by the City's procurement, of the taxpayers' bill for injunction above referred to; gives its history; sets forth the City's subsequent conduct; its notice in December, 1894, that the city would not be liable on the contract after January 1, 1895, and the Waterworks Company's reply declining to acquiesce in the repudiation of the contract by the City, and giving notice that it would continue to furnish water with the required pressure for the use of the City for fire protection; that the Waterworks Company has since that time furnished the service contracted for and carried out the contract on its part.

The bill sets forth the provisions of the contract with reference to the payment of municipal taxes by water service furnished and that the company has at all times held itself in readiness to furnish the water contracted to be supplied in lieu of City taxes, notwithstanding which the City has assessed, levied and attempted to collect such taxes, and an execution has been issued and placed in the hands of the city marshal for the collection thereof by seizure and sale of the Waterworks Company's property.

The bill sets forth the holding of the election on December 12, 1894, to determine whether the city should issue bonds to

erect or buy waterworks and electric light plant for the City; the result of the election; that $10,000.00 of the amount so authorized have been issued and sold and with the proceeds the city has erected an electric light plant; that the remainder amounting to $25,000.00, has not been sold, but were held by the City under its purpose to first invoke a ruling of the court, whether or not its contract with the Waterworks Company was binding. It is charged that it was the plan and purpose of the City while intending to repudiate its aforesaid contract, nevertheless to continue to use the water and enjoy the fire protection thereby afforded till such time as suited its convenience to sell its bonds and erect its own waterworks. The Supreme Court of Georgia having decided that the contract created a debt such as was forbidden by the State Constitution, the City of Dawson engaged in an effort to procure a sale thereof for the purpose of erecting a system of waterworks in violation of its aforesaid contract and in total destruction of the property which forms the security of the holders of the bonds. The bill sets forth that notwithstanding the City's pretended rejection of the contract, it has continued to use the water at all times in pursuance of its scheme and intention to receive the benefits, though declining to carry out the obligations of the contract, and pretending not to use the water which it was so using. The public ordinances of the City providing for the use of the water by the fire department of the City were never repealed; the fire companies were not notified that they were no longer to use it, or forbidden its use; no other source was provided by the City; hose and other apparatus were furnished them by the City wherewith to use the water, and the persons composing the fire companies were given tax exemptions by the City in consideration of their services in putting out fires with the water furnished for the purpose by the Waterworks Company under the contract; that the mayor and council were present at the various fires and saw the water so used, and that it was their purpose that it should be so used, and that they assisted in its use; that the mayor, who, in December, 1894, addressed the notice to the

Waterworks Company that the City would no longer use the water, a few weeks thereafter, being still mayor and still engaged in carrying out and effectuating as mayor the City's purpose of repudiating its contract, assisted with his own hands in turning the water on a burning building and thereby putting out the fire and protecting the adjacent buildings against the spread of conflagration.

The bill narrates the City's conduct in carrying out its purpose to destroy the contract, and the value of the property which forms the security of the bondholders. The Waterworks Company has no property save its waterworks plant, which derives its value from its contract with the City of Dawson and the rights secured by said contract. Other than from these sources, it has no means with which to pay the operating expenses and the interest and principal of the bonds. The abrogation of its contract with the City would result in the almost complete destruction of the value of the property of the Waterworks Company. If the City of Dawson should be permitted to erect and operate its own system of waterworks, the company would be in no position to compete successfully for the patronage of private consumers. The Waterworks Company, recognizing the right of the complainant to demand and receive the rental due, and to become due under its contract with the City, in order to protect the rights of the bondholders, has yielded to complainant's demand, that complainant shall in future have the exclusive right to collect from the City of Dawson all rentals accruing under the contract for the year 1896 and subsequent thereto, of which the city has been duly notified, and payment of rentals has been demanded. The bonds issued by the Waterworks Company were in the first instance sold by the American Pipe Manufacturing Company, a New Jersey corporation. The latter company sold all of its bonds in open market for value, and the same are now owned by a number of different persons.

The pipe company is largely engaged in the construction of waterworks and has frequent occasion to negotiate and sell

the bonds of such companies, and in a business way is interested in upholding the commercial value of such securities. The Pipe Company, in order to save the waterworks plant from foreclosure and sale, paid the interest falling due on the bonds up to and including that due March 1, 1899. Under an agreement with the Waterworks Company, as complainant was informed, the Pipe Company should be subrogated to the rights and remedies of the original holders of the interest coupons.

As part of the relief originally prayed, the bill asks that the moneys thus expended may be repaid if there should come into complainant's hands a surplus sufficient for the purpose, over and above the payment of accruing interest on the bonds and the creation of a sinking fund to be used in the discharge of the principal of the bonds. The bill prayed for appropriate equitable relief. Amongst other prayers, is a prayer for an injunction against the City of Dawson, restraining the erection, installation, or operation of any system of waterworks in and for said city, and from entering into any contract with any other person for the construction, operation, or use of any system of waterworks, or for the supply of water for fire protection in violation of the aforesaid contract with the City of Dawson, and from issuing or disposing of bonds, or paying out money, or incurring obligations, or entering into or carrying out any contract for the corporation of a system of waterworks other than that existing with the Dawson Waterworks Company.

It is further prayed that the sanctity and the integrity of the contract between the City of Dawson and the Dawson Waterworks Company be kept intact, and that said contract be decreed to be valid and mutually binding upon the parties thereto; that the said contract be required to be specifically enforced; that the complainant may recover from the City in trust for the benefit and use of the bondholders, the rentals due by the City for the use of the water for the year 1896, and the succeeding years, and for general relief.

The bill, it will be seen, is between a corporation of the city of Philadelphia, as complainant, and a Georgia Municipal corporation, the Dawson Waterworks Company, a Georgia corporation, and certain individuals, citizens and residents of Georgia, as defendants. It, therefore, would seem that the court has jurisdiction on the ground of diversity of citizenship, as the relief to which the complainant was entitled necessitated the joining of the several persons named as defendants, in order that such relief might be effectual and complete; that the right thereto was original and primary, and ought not to be defeated because on some of the questions the Waterworks Company might also be benefited by the relief.

Upon this bill a rule *nisi* was duly issued and served, and a temporary restraining order was granted.

On June 26, 1899, prior to the hearing of the rule *nisi*, complainant, by leave of the court, amended its bill of complaint, setting up more explicitly that the ordinance of the City of Dawson repudiating its contract, was an attempt to impair the obligation of the contract and destroy the value of the property which formed the basis of the bondholders' security in violation of the constitution of the United States; that the ordinance of the City ordering an election for December 12, 1894, to determine whether the City should issue bonds for the purpose of erecting a system of waterworks and an electric light plant, and the act of the voters of the town at such election, in rendering the ordinance of the city council effective, and the ordinance declaring the result of the election so held, and the refusal of the city to levy a tax for the purpose of paying the taxes due the Waterworks Company, are all and singular laws in impairment of the obligations of the contract between the City of Dawson and the Dawson Waterworks Company, and in violation of the Constitution of the United States, and in destruction of the rights of bondholders in said contract and in the property which derives its value from the existence and obligations of said contract.

In the amendment it is further alleged that such ordinances and conduct on the part of the city, if given effect, will deprive the holders of the bonds of the Waterworks Company of their property without due process of law in violation of the federal statute. The amendment with greater detail and more specifically than it is here stated, sets forth that the various ordinances and acts of the city, complained of, were in violation of and an impairment of the contract clause of the United States Constitution, and jurisdiction was distinctly predicated on that ground.

The City of Dawson and the mayor and members of council, in answer to the rule, interposed a pleading denominated "Showing for Cause," and consisting in part of objections to the jurisdiction and in part of denials and averments "by way of answer to the allegations in said bill." This answer is exceedingly sweeping in its denials. It starts off by denying "each and every allegation in said bill, except as may be expressly admitted," and defendants having averred everything in the bill to be untrue, except as expressly admitted, carefully admit nothing but such facts as they conceive to be good matters of defense, and they demand "full and strict proof" of everything of any importance. These sweeping denials are supported by the oath of the mayor, all the aldermen and the city marshal. They deny that complainant is a corporation, that a mortgage was executed, that there was a trustee or bonds or bondholders, or that any money was raised by the sale of bonds, or that the City contemplated that money was to be so raised; deny that the City used the water, and in the same answer deny that at various times when it was used it was of requisite and sufficient pressure as required by the contract. The defense chiefly relied upon was the contention that the contract between the City and the Waterworks Company was void under the Constitution of the State of Georgia, and had been so declared by the Supreme Court of the State of Georgia in the case of the City of Dawson *vs.* Dawson Waterworks Company, 106 Ga. 696.

The cause came on to be heard under the rule before Circuit Judge Pardee. Various affidavits were submitted. The facts as developed were such as are hereinbefore set forth. The City by its affidavits sought to show that the system was not kept in repair, that the water was allowed to run down in the stand pipe, that the requisite pressure was at several fires mentioned insufficient.

The complainant, in rebuttal, introduced a large number of affidavits from persons most active and of greatest experience in the work of fighting flames, showing that such failures as occurred were not in fairness to be charged up to the score of the Waterworks Company, but were due to other causes. This feature of the case will be discussed further on. It may be useful, however, to mention at this point the following facts, established both by the affidavits at the preliminary hearing and by the testimony of the witnesses on the hearing before the Master:

1. The contract requirements and specifications are such as to get a good and efficient system of waterworks, fully up to the needs of a town the size of Dawson.

2. The system, when completed, was fairly tested and found to be up to the contract requirements. From the completion of the system, August 12, 1891, to June 27, 1894, the date of the ordinance repudiating the contract, the water had been used at a number of fires and at all was entirely satisfactory. After June 27, 1894, the water continued to be used at all fires for more than two years without complaint. The first fire as to which any complaint is made as to the pressure was a fire which occurred July 28, 1896. It was shown by the uncontradicted testimony that at this fire the water was only half turned on, a fact only discovered at the end of the fire. (Affidavit of B. R. Fussell). With this exception, there was no fire at which there was a lack of pressure or complaint on that ground, till a fire, known as the Green & Whitehard fire, which occurred June 11, 1897. And nearly all of the fires as to which there is any alleged insufficiency of pressure occurred, ~~the twelve,~~

between that date and the summer of 1898, most of them in the driest part of the summer; that they were in the main at the weakest part of the system, that the fire companies were badly disorganized; the hose, most of it, old and defective; long lines of hose were employed leading to great loss of pressure; and that there was a general want of efficiency and intelligence in handling the hose and fighting the fire.

The record of the testimony offered upon both trials of the case of the Dawson Waterworks Company against the City of Dawson in Terrell Superior Court, hereinbefore referred to, is in the record. (Printed Record, page 416 to 449.) It appears that at the first trial which took place the latter part of November, 1896, no evidence was offered of any failure of pressure. At the second trial which occurred in July, 1898, it was proposed by the defendant to show that at a fire which occurred in 1897, at a particular hydrant, the system would not throw a stream of water fifty feet high. No complaint was ever made at any time to the Waterworks Company of any insufficiency of pressure and no request for a strengthening of the system or any part of it.

The water was used at all the fires which occurred, and was of the most incalculable benefit to the city and its inhabitants in protecting their property from fire. At one of these, the Farnum House fire, which occurred April 14, 1898, the entire business portion of the town was thereby saved after the fire had gained such headway that destruction seemed inevitable; the amount saved from destruction by the use of the water at that one fire amounted to several hundred thousand dollars, according to the best estimates obtainable.

The evidence seemed to establish clearly that such failures as resulted were due, at least chiefly, to causes for which the waterworks were in no wise responsible, having occurred at a time when the city had permitted its fire department to reach the stage of greatest inefficiency in its effort to support the contention that the action of the fire department was not "official;" the affidavits establish that at all these fires very long lines

of hose were used, and the friction loss from this source was largely increased by the fact that the hose used was largely old, leaky, and in bad condition. The number of hose lines employed, and the length of lines, were beyond the pressure capacity of the smaller mains.

There was no system of inspecting hose, and rejecting such as was bad; no drilled, trained firemen; no intelligent head to direct operations; no proper regard to the capacity of mains, or laws of friction losses; no attempt in any case to counteract friction loss incident to long lines of hose by uniting two or more into one by twin coupling at a point near the fire, so as to give a good strong stream. These facts are sufficient to fully explain all the failures and shortcomings at all the fires where the results were unsatisfactory.

These alleged failures, however, occurred at a time when the City of Dawson owed for water rentals an amount varying from about $8,000 at the beginning to $12,000 at the close.

The city had grown in certain directions, leading to an increased consumption of water in certain quarters, and the consequent diminution of the pressure in certain portions of the system. The contemplated extensions the Waterworks Company had not been able to make by reason of the City's action in thus cutting off its revenues.

No notice of any complaint of any character had ever come to the trustee or the bondholders until the coming in of the defendant's answer to the Rule. While these complaints were believed to be due at least in chief part to the inflamed state of mind into which many good people had been wrought up by the long and bitter fight which the City had waged against the Waterworks Company, yet the trustee representing the bondholders, and carrying out their wishes, determined to make such extensive improvements as could not fail to meet the wishes and requirements of the people of Dawson.

In the amendment, above referred to, which was prepared and allowed after the coming in of the defendant's answer to the rule and affidavits, the complainant enlarged the scope of

the original bill by adding thereto the following: (Record pp. 38 and 39):

> Your orator is informed and charges the fact to be that, prior to said decision rendered last March, the Dawson Waterworks Company had already planned and arranged to make extensive repairs and improvements of its plant, which would very materially better the service and increase the water pressure and height and strength of fire streams afforded by said system; but in its present financial condition, with its revenues cut off, and its very existence threatened by the proposed opposition system, said Waterworks Company is not in a condition to float betterment bonds, or borrow money to make said proposed improvements and repairs, and has withdrawn the contract for making the same. Your orator never heard of any complaints as to said waterworks, or the character of the service, until the filing of the defense in this present case, and from an investigation is led to believe that if any cause for just complaint exists, it exists very slightly, and in the present unfortunate attitude of said city has been greatly and unjustly exaggerated. Yet your orator recognizes that said complaints, even though unfounded, work great financial injury to the revenues of said company, and its property, and your orator recognizes that while repairs are perhaps not urgently needed at this time, yet it will be necessary in future to make repairs and extensions in said system from time to time during the lifetime of said contract. The said Waterworks Company can not, in the present condition of affairs, make such repairs and improvements; unless the same are made as they become necessary, the bondholders will lose revenue as well as the property which constitutes their security.
>
> Your orator prays that this Honorable Court will direct that the rentals owing by said City of Dawson may be paid out, as they are collected, in making such repairs, betterments and extensions of said system as the due protection of the rights and interests of bondholders may require, and that if need be, certificates of indebtedness against said plant and its revenue be authorized by this Honorable Court so as to make such repairs and improvements as may be necessary before said rentals can be collected, and that

> the Dawson Waterworks Company be required on its part to specifically perform all its obligations under said contract, and continue to furnish such service as the contract calls for, and that the benefit of said contract may be preserved, and that thereby the rights of bondholders may be protected and saved."

The offer thus made was made in good faith, and was carried out as early as was practicable by the erection of a new stand-pipe, having twice the capacity of that called for in the contract and forty feet higher, and capable of giving an amount of pressure in every part of the system considerably in excess of the contract requirements. This new stand-pipe was erected at a cost of $7,000, although the city at the time was indebted for hydrant rentals in the sum of $13,000, and was still making every effort in its power to break the contract, and render this large investment valueless. As shown by the uncontradicted testimony, furnished in large part by the defendant's own witnesses, there has never on any occasion been any failure of pressure during the four years since the new stand-pipe was erected.

> "The cause came on to be heard under the rule before Circuit Judge Pardee, whereupon the court, after considering the evidence and the argument of counsel granted on September 16, 1899, an order for injunction *pendente lite* as prayed in the bill, and further ordered that the defendants might apply to the court at any time after thirty days from the date of the order for a test of the ability of the Dawson Waterworks Company to perform its obligations in regard to the furnishing of the water to the City of Dawson for municipal purposes and fire protection, according to the letter and spirit of its contract; and upon such application the court would order a test and trial of the same by experts, under the direction of a Master, and take such action upon the Master's report as equity might require. The injunction as ordered was duly issued."
>
> (Master's Report, Record p. 82.)

The defendant never applied for a test and trial of the sufficiency of the system and the service furnished as it was provided by this order the city might do.

The further history of the case may also be stated in the language used by the Master in his finding:

> "From this order granting an interlocutory injunction, an appeal was duly prosecuted to the Circuit Court of Appeals. That court dismissed the appeal without considering the merits of the controversy, upon the ground that an appeal will not lie to a Circuit Court from an order granting an interlocutory injunction in a case involving the construction and application of the Constitution of the United States. (City of Dawson *vs.* Columbia Avenue &c Co., 102 Federal 200.)
>
> To the original bill the defendant City of Dawson demurred for want of jurisdiction in the court, on the ground that after arranging the parties according to interest, the requisite diversity of citizenship did not exist, and on the further ground that no Federal question was involved. The defendant also demurred to the bill for want of equity, on the ground of an adequate remedy at law. After argument of counsel the demurrer was over-ruled on July 8, 1901, 'the court considering the law and equity to be with the complainant and the demurrer to said bill not well taken.' "
>
> (Record page 82.)

Thereafter, on the 3rd day of August, 1901, the City of Dawson, and the defendants who were being sued in their representative capacity as officers of said city, filed their answer to the bill as amended.

This answer was likewise sweeping in its denials. The mayor, the city marshall, and every member of council support by their oath all the sweeping denials of this answer. The answer declares:

(Record page 42.)

> "The said defendants do now say, that they deny each and every allegation contained in said bill, except as may be expressly admitted, and demand full and legal proof

> of the same so far as it may be proper and competent to make such proof. They do not admit that complainant is an existing corporation as alleged."

The answer then proceeds, either directly by express words of denial, or indirectly by the use of the words, "do not admit or deny" the execution of the mortgage, although the original, duly executed had already been put in evidence; also the existence of the bonds, and the appointment of the trustee. The answer expressly denies the sale of the bonds, and the advance of the money on the bonds. The answer denies that complainant is a corporation, and contains numerous other similar denials of facts which had been positively proved on the hearing of the rule. The original answer to the rule had alleged that the works did not furnish the required amount of pressure, and that the system had not been kept in proper condition for the prompt and effectual use in extinguishing fires. There was no complaint in that answer as to the purity or wholesomeness of the water, or its fitness for domestic use. The trustee for the bondholders, wishing to remove the complaints made by the answer to the rule, erected a new and larger stand-pipe forty feet higher than the old stand-pipe, and affording a pressure which was at all times in excess of the contract requirement. This was done at an expense of $7,000. The trustee hoped that this liberal expenditure would remove all past dissatisfaction. In the latter answer, however, the City adds to its former complaint the following: (p. 70.)

> And these defendants further answering all of the allegations in said bill to the effect that the Dawson Waterworks Company had fully performed its contract, do now deny said allegations and do say in addition to what has already been set forth in this answer on that subject, that the water furnished by said company as referred to in said allegations was not only inadequate for protection against fire but impure and unwholesome and unfit for domestic use and sanitary and other useful purposes.
>
> They further say that at times said water was so muddy that it was not only unfit to drink but was unfit for bath-

> ing purposes, and that on one occasion when said water was sought to be used to extinguish fire in Baldwin's lumber yard on or about the 28th of July, 1896, the said water was so thick with mud that for some time the same could not be used for said purpose, the delay being very disastrous so far as said fire was concerned." (Record p. 70.)

This complaint is thus urged for the first time after litigation in different forms, for the purpose of breaking this contract, had been going on for upwards of seven years, and after the trustee for the bondholders had expended $7,000 in removing every complaint that the city up to that time had thought fit to make. The source of supply was selected by the City, and by unanimous resolution of the Mayor and Council had been declared to be acceptable as a supply before the American Pipe Manufacturing Company purchased Bennett's franchise and undertook to construct the works. The so-called muddiness was simply the slight color of turbidity which existed when the water was accepted, and which is pointed out in the analysis upon which the city's acceptance was based. In that analysis the water is described as follows: (Record p. 311.)

> "Faintly turbid; slightly colored by vegetable matter in solution. Slightly organic sediment on standing. Organic impurity slight and entirely unobjectionable. A pure, safe water."

It was disclosed by cross-examination of the city's witnesses that shortly before the trial an analysis of the water had been made at the instance of the city, and that the city did not see fit to offer this analysis in evidence, or to apprise the court of the result. No expert testimony as to the quality of the water was introduced except the analysis of the State Chemist above referred to. The Master found as follows: (Record p. 91:)

> The General Assembly of the State of Georgia passed an Act, approved September 7, 1891, for the protection of the water supply of the waterworks of the City of Dawson. By this act it was made unlawful to obstruct or

interfere with the flow of the stream, or pollute or contaminate in any way or by any means the water of the stream or watershed, so as to affect in any degree the quality or purity of the water. It was made unlawful to place or deposit any dead animal or vegetable matter in the swamp bordering on and surrounding the stream, its springs and branches, so as to affect the purity and quality of the water. The violation of these provisions was declared to be a misdemeanor. The police supervision of the marshal and policemen of the City of Dawson was extended over the water-shed, and the officers were empowered to make arrests therein for violation of the provisions of the act. The ordinance of the City of Dawson made it the duty of the mayor to appoint three members of the council, whose duty it should be to superintend the waterworks and water supply of the city, and to see that the owners of the Waterworks Company complied with their obligations in furnishing water to said City and private individuals.

(City Code, paragraph 242.)
(Record page 91.)

No complaint had ever been made by the city as to the quality of the water either to the Waterworks Company or the trustee for the bondholders. No request was made that anything be done by the water company to protect the water or the watershed.

It has always been the policy of the Waterworks Company to listen to and remove all reasonable complaints. The general superintendent of the company has so stated to the Mayor and members of Council on a number of occasions. The test authorized by the order of the Circuit Court granting the injunction *pendente lite* applied to the quality of the water as regards purity and wholesomeness as well as every other feature of the contract. The complainant has stood ready at all times to have such test made if the city desired it.

To this answer a replication was duly filed, and at this stage of the case reference was made to the Master. (Record p. 85.)

By order of reference all issues and questions of law and of

fact were referred, the order of reference being as follows: (Record p. 75:)

> "This cause coming on to be heard upon the application of complainant for reference thereof, and it appearing to the court that the said cause is at issue upon the complainant's bill of complaint, and the amendment thereto, and the defendants' answers to said bill and amendment and the general replication filed by the complainant to said answers, and it appearing that a reference of said cause should be had for taking of proofs, touching the matters in issue, and to ascertain and report upon the several matters and questions in issue in said cause, it is now here ordered that the said cause be and the same is hereby referred to Wm. A. Wimbish, a standing Master of this court, and he is hereby made a Master in said cause and directed to take proofs on all and singular the issues herein, and to ascertain and report touching all matters in issue in said cause, and he is authorized to discharge his duties as such master at any convenient place, as he may be advised, outside of, as may be agreed, as well as within, the said district.
>
> In Open Court this 2nd day of December, 1901.
>
> WM. T. NEWMAN,
> United States Judge.
>
> We consent.
> LAING, GUERRY & HALL,
> Solicitors for Defendants.

The evidence was fully taken and after lengthy oral arguments, and the filing of elaborate briefs, the Master submitted an able and learned report. The Master had the matter under consideration nearly a year, and the report bears evidence of the most careful and patient examination of the voluminous evidence in the case. An examination of the full evidence will show that every finding of fact is fully sustained by the proof. The exceptions present detached and fragmentary excerpts from the testimony of the various witnesses, omitting the qual-

ifications which some witnesses made in other portions of their testimony, and omitting all reference to other testimony, the evidence in the case conflicting in many instances. These exceptions were considered by the Master, who heard suggestions of counsel and argument thereon, after submitting to counsel his draft report and before finally adopting and filing the same. The exceptions were also fully and carefully considered by the Circuit Court, who held the matter under consideration several weeks before reaching his conclusion. The final decree, rendered August 3, 1903, sustains the findings of the Master.

ARGUMENT.

I.

The appellant challenges the jurisdiction of the court as a court of the United States, and also the court's equitable jurisdiction as a court of equity.

Jurisdiction is predicated both upon diversity of citizenship and the existence of a federal question. The grounds upon which equity jurisdiction is invoked are set forth later on in the brief.

II.

The complainant is a Pennsylvania corporation. The bondholders, in whose behalf the suit is brought, are all of them citizens and residents of States other than the State of Georgia, though this last mentioned fact is not deemed material, the bondholders not being themselves parties and the right of action being in the complainant as their trustee. The defendants are the City of Dawson, a Georgia municipal corporation, the Dawson Waterworks Company, a Georgia corporation, and certain individuals all of whom are citizens and residents of Georgia.

The contention of the appellant is expressed in the thirteenth assignment of error, as follows:

> "13. The court erred in granting said decree for said injunction, because under the averments of said bill as amended, the court had no jurisdiction of the cause, it appearing that the Dawson Waterworks Company should have been party plaintiff, if any lawful party at all, and not defendant; was a corporation created by the State of Georgia having its only existence and domicile therein, and in said district, all of these defendants being likewise resident in said State and district." (Record, page 178.)

In the specifications of error in appellant's brief, this same ground is differently stated, as follows:

"The court erred first in not dismissing complainant's bill for want of jurisdiction, because under the pleadings there was no diversity of citizenship, the water company, the real complainant, and the city, the defendant, both being Georgia corporations, the assignment of the cause of action to nominal complainant being fictitious, merely colorable, and without interest, and for the purpose of conferring Federal jurisdiction." (Appellant's Brief, page 23.)

It is urged on behalf of appellant that, ~~inasmuch as~~ the fact that the Dawson Waterworks Company may, in some part of the relief sought, have an interest in the question which may be advanced rather than injuriously affected by the success of the complainant's bill, makes the Dawson Waterworks Company a necessary party plaintiff and the joinder of that company as defendant an improper or collusive joinder of parties for the purpose of creating a case cognizable in the United States Courts. It is, of course, a familiar rule, reinforced by Act of Congress, that the court will not permit an ingenious or capricious arrangement of parties, or the setting of parties on the wrong side of the docket, where it is plain they do not properly belong and would not have been placed except for purposes of obtaining an apparent diversity of citizenship, different from the fact as tested by sound principles and correct rules of pleading. The court will, in such case, rearrange parties for the purpose of determining whether or not jurisdiction in fact exists. If it be in fact true, as appellant contends, that the water company is the real complainant, jurisdiction can not, of course, be predicated upon diversity of citizenship, but would be dependent upon the question of whether there exists a federal question.

We do not, however, understand the rule to be that because one or more of the defendants may have interests in the controversy, or some portion of it, of a character more closely kin to the rights claimed by the complainant than those asserted by the defendant, that the court is for that cause without jurisdiction, if it appear that the complainant is proceeding is his own right and for his own protection and has an independent title to the relief

prayed and sought, and that the bill is in good faith prosecuted by the complainant on its own behalf and for its own protection and benefit. If this were not the rule, bondholders of a corporation, though citizens of a different State from the wrongdoer, and though the title to their security is in a trustee also a citizen of a State different from that of the wrongdoer, would be without the right to ask the protection of a federal court in all cases where the corporation, whose bonds they hold, may be a citizen of the same State with the actual perpetrators of the wrong. The test is not whether benefit may unavoidably flow to some one or more of the defendants, if complainant is successful. Such a test applied to suits in equity would overturn the settled rules and well-recognized principles upon which courts of chancery have always acted in granting relief. For it will be found that a large part of the superiority of the equitable over the common law remedy inheres in the forms and rules of remedial procedure, and particularly in the rule which permits the plaintiff in a court of equity to bring in as defendants all parties necessary to enable the court to do complete justice with respect to the subject matter of the suit, without regard to the question of the attitude they may occupy towards each other or to the plaintiff. The common law procedure subordinates every other consideration to the necessities of the peculiar mode of trial, namely, the bringing of the case to an issue of law to be passed upon by the court, or an issue or few simple issues of fact to be tried by a jury by means of successive altercations of two parties ranged on opposites of a two-sided question and all parties were ranged, according to interest, on one or the other of the two sides. The consequent loss of power to do complete justice with respect to the subject matter, the loss of flexibility of remedy, the contracted and more or less artificial rules which grew up under this system and reflected themselves in the color which they gave to legal principles themselves, were amongst the great causes which made it necessary for courts of equity to interfere for the purpose of supplying the law's defi-

ciencies. It has never been held that the rule of law, defined and intended merely to prevent fraudulent and collusive suits, abrogates the settled rules of equity pleading by reducing everything in the case to a two-sided issue and ranging all persons according to the interest on one or the other of the two sides of that issue, and by such compulsory rearrangement of parties ousting the court of jurisdiction though the suit was properly according to the principles which regulate equity procedure and determine equity jurisdiction.

This bill is brought in the right of bondholders by their trustee, and solely for their protection. The subject matter of the suit is the bondholders' security. That security belonged beneficially to the bondholders. The legal title to it is their trustee. The Dawson Waterworks Company does not own the security created by that mortgage, or any part of it. The rights which the trustee sets up are distinct from any rights which may belong to the waterworks company. The waterworks company would not be a proper plaintiff to assert and invoke the aid in the protection of the rights of these bondholders. The equity of these bondholders is primary, original, independent. The security created by the giving of a mortgage is property which the court will protect against injury or destruction. The mortgagee acquires by his mortgage a right of which he may not be deprived by anything which the mortgagor may do, or omit to do. The contention of appellant, if allowed, would be more far reaching than merely to defeat the right of bondholders to invoke the protective aid of the federal court. If the contention be correct, that the creditor who gave the mortgage is a necessary party plaintiff, then the security created by the mortgage may be destroyed, and the mortgagee would be without right to invoke the protection of either the state or federal courts of equity.

In the case at bar, the wrongful acts of the city of Dawson had more than destroyed the value of the property over and above the mortgage security, and in large part had already destroyed the value of the security itself. What was left was insufficient to pay the mortgage debt, and no substantial

interest remained in the mortgagor. The mortgagor, by resolution, declined to take any action against the city. The mortgagor was powerless to cope with the situation, being left by the city's wrongful act almost insolvent and unable to secure the necessary funds to continue the operation of the waterworks and thus preserve this valuable contract and the property dependent upon the continued existence of such contract. It was necessary for the mortgagee to at once take action in its own behalf, or its security would be utterly destroyed and the damages sustained by it irreparable. It would be mockery to say to the mortgagee that the courts are not open to him, but that the insolvent mortgagor must be made a plaintiff before the court will design to grant any relief.

It is not meant by this that the Waterworks Company is not a proper party. It would be proper to join it as a party in order that the decree of the court might completely protect the City of Dawson against future litigation. The Waterworks Company is entitled to be heard, if it so desires, upon the averments as to its insolvency, as to its inability to cope with the situation, as to its refusal to sue, and other averments relating to transactions in which it was an actor. The Waterworks Company was a proper party in order that it might, if it desired, be heard in resistance of the complainant's prayer, that the hydrant rentals be utilized in betterments and extensions and not in extinction of the mortgage debt, as under certain circumstances the Waterworks Company might have the right to insist. And the Waterworks Company was entitled to its day in court upon the question whether or not such circumstances did exist as will be pointed out later on in the discussion. It was a proper and necessary party for the further reason that affirmative, equitable relief was prayed against it by the bill and granted by the final decree. This, however, is a very different thing from appellant's proposition, that the Waterworks Company is the necessary plaintiff, or a necessary plaintiff, and that the bill can not be maintained because the Waterworks Company does not join as plaintiff. That there is no improper joinder or arrangement of parties that jurisdiction may properly be invoked on the ground of "diver-

sity of citizenship," we think is abundantly established by the authorities.

154 U. S., 362, Reagan *vs.* Farmers Loan & Trust Co.

128 Fed. Rep., 907, City of Seymour *vs.* Farmers Loan & Trust Co. of New York, (Circuit Court of Appeals, Seventh Circuit).

63 Fed. Rep. 213 Bowdoin College *vs.* Merritt. (See opinion of Mr. Justice McKenna, at that time Circuit Judge.)

37 Fed. Rep., 817, Belding *vs.* Gaines *et al.* (decided by Mr. Justice Brewer at that time Circuit Judge, and Judge Caldwell).

97 U. S. 13, Hotel Co. *vs.* Wade.

131 Fed. Rep. 890, Farmers Loan & Trust Co. *vs.* City of Sioux Falls, Syllabus 3.

III.

It is, however, argued that the resolution of the Waterworks Company, authorizing the Trustee for the bondholders to demand and collect the water rentals, constituted an assignment or transfer of a chose in action, the original parties to which chose in action were both of them citizens of the State of Georgia, and that the Court had no jurisdiction on the ground of diversity of citizenship to render a decree against the city in complainant's favor for the amount of such hydrant rentals under the provisions of the Judiciary Act of 1887, to the effect that the federal courts shall not "have cognizance of any suit except upon foreign bills of exchange to recover the contents of any promissory note or other chose in action in favor of any assignee or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

If the present suit were an action at law, brought by the Trustee for the recovery of the hydrant rentals, we think even in that case that the fact that in the waterworks contract the city undertakes and agrees to pay the hydrant rentals either to

the Waterworks Company or to the Trustee for bondholders, as alt ernative payees would give the Trustee the right to sue in a federal court.

128 Fed. Rep. 907, City of Seymour *vs.* Farmers' Loan and Trust Co. of New York.

The mortgage and the agreement that the mortgaged hydrant rentals might be collected by the Trustee are to be taken as subsequent acts merely completing the inchoate right of action in the Trustee by the original contract, and that the Trustee is not to be regarded as merely an assignee. We think, however, it is sufficiently clear that the Judiciary Act, above referred to, has no application to a bill in equity brought by the Trustee for bondholders to protect from destruction the security for their debt against wrongdoers, whose acts, if not restrained, would bring about such destruction ; and a court of equity, having jurisdiction for this primary purpose, would undoubtedly, we think, have jurisdiction to grant complete relief, though a part of that relief were the collection of hydrant rentals conveyed by the mortgage. We think, therefore, that the jurisdiction of the United States Court over the entire controversy, as a court of equity, clearly exists on the ground of diversity of citizenship, as well as on the ground of the existence of a federal question."

IV.

The Court had jurisdiction by reason of the Federal questions presented. The complainant in his bill asserts such rights under the Constitution of the United States, in that the contract existing between the city of Dawson and the Dawson Waterworks Company, constituting the basis of the security of the bondholders, and in which they showed beneficial rights entitled to protection, was impaired by the action of the city of Dawson, through ordinances adopted by its council, and the action of the city thereunder and in giving the same effect. It was also alleged that the property of the complainant

was taken without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. These rights are explicitly asserted, and jurisdiction is distinctly invoked by reason of the suit being a suit arising under the Constitution of the United States. The city being one of the properly constituted instrumentalities of the State, the ordinances of the municipality are the acts of the State and their unconstitutionality is the unconstitutionality of a State law within the meaning of the Constitution and Acts of Congress touching the jurisdiction of the Federal Courts.

172 U. S. 1, Walla Walla City *vs.* Walla Walla Water Company.

189 U. S. 207, Davis & Farnum Manufacturing Company *vs.* Los Angeles, and citations.

181 U. S. 142, St. Paul Gas Light Co. *vs.* St. Paul, and citations.

"The grant of a right to supply water to a municipality and its inhabitants through pipes and mains laid in the streets of a city, upon condition of the performance of its services by the grantee, is the grant of a franchise vested in the State (which may be made by municipal authorities when the right to do so is given by their charters) in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States against State legislation to impair it."

172 U. S. 1, Walla Walla City *vs.* Walla Walla Waterworks Company, *supra.*

That a contract for water supply was within the charter powers of the city of Dawson at the time the contract was made, we think the authorities hereinafter cited establish beyond a doubt.

"The jurisdiction of the Circuit Court is established when it is shown that the company had or claimed to have a contract with a State or municipality which the latter had attempted to impair, and so long as the claim is apparently

made in good faith and is not frivolous, the case can be heard and decided on the merits."

194 U. S. 112, Pacific Electric Railway Company *vs.* Los Angeles.
166 U. S. 557, City Railway Company *vs.* Citizens' Street Railroad Company.
180 U. S. 28, Illinois Central Railroad Company *vs.* Adams.

(Persons having a property interest in the contract and immediately and directly based thereon and derived therefrom, are, of course, equally within the rule).

It will hardly be contended that the existence of this contract and its impairment are not claimed in good faith, or that the claim is frivolous, in view of the same having been upheld after a most thorough and painstaking investigation by the learned Master in Chancery and the learned Judges of the Circuit Court. We take it, therefore, that whatever may be the opinion taken by this Court as to the merits of one or other of the complainant's contentions, the Court will have no difficulty in reaching the conclusion that the case is one of which the Circuit Court had jurisdiction, by reason of the suit being one arising under the Constitution of the United States. The Court, therefore, being a court vested with jurisdiction, will proceed to determine the case on the merits and grant relief as a court of equity.

V.

The case was not only a case within the jurisdiction of the Circuit Court, but was also a case falling properly within the jurisdiction of a court of equity. The public interests affected, the large number of people interested in the matter of water supply, the necessity for protecting public interests and safeguarding the rights of all parties during the pendency of litigation, the irreparable injury that would result if, in advance of a correct determination of the constitutional questions involved,

the city were to take action which would not only result in the destruction of this valuable waterworks property and the bonds of these bondholders, but would also involve the waste of public revenue which would result from the erection by the city of municipal waterworks for fire protection, in the erroneous belief that it was not bound to pay for the fire protection under this contract, if the contract be held valid, even though the franchise should be held not to be exclusive, make the present case peculiarly a case for the exercise of equity jurisdiction. "It is one of the most valuable features of equity jurisdiction to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable; and the exercise of such jurisdiction is for the benefit of both parties in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injury which if inflicted would be wholly destructive of his rights."

185 U. S. 65, Vicksburg Waterworks Company *vs.* Vicksburg.

The case presented is not simply a denial by the city of its obligation to pay. Such denial by an ordinance would not, without more, be any more efficacious than a denial of liability by plea. An ordinance, however, not only declining to pay, but attempting to repeal a valid ordinance making it the duty of the city to levy taxes for the payment of the service, accompanied further with an effort to continue to receive the benefits of the contract, while denying its obligation and denying the use, and further attempting again to collect taxes by levying upon the property of the Waterworks Company, in violation of the provision in the contract that services already rendered by the company should be accepted in payment of such taxes, and a course of conduct deliberately entered upon and stubbornly persisted in by which the various rights secured by the contract were destroyed, the city's obligations under the contract repudiated, denied and ignored, and the property deriv-

ing its value from the contract rendered valueless, is very far removed from the case of a simple refusal to pay and a denial of liability which can be met and redressed by an action at law for the collection of the rentals. All these things are in addition to the ordinances of the city for the issue and sale of bonds, and the erection of its own system of waterworks, not only to supply water to the inhabitants in violation of the city's express agreement that the Waterworks Company was to exclusively furnish water for such purposes during the life of the contract, but in violation of the city's express obligation to take all the water required for fire protection from the Waterworks Company during the twenty years that the contract ran. It will be hereafter shown, we think, that the exclusive franchise granted by the city to the Waterworks Company contravened no constitutional provision or rule of law, and is within the business powers vested in the city by its charter, and valid and enforcible.

In any event, the mutual obligations of the contract that the company should extend its mains and pipes, enlarge its plant, and generally enlarge its system from time to time to meet increasing demands consequent upon the growth of the city, and that the Waterworks Company on its part was to have the exclusive right to construct, maintain and operate waterworks in the city for the purpose of supplying the city, its inhabitants, citizens and residents, with water for protection against fire, and for domestic, sanitary and other useful purposes, embraced and constituted a valid agreement upon the part of the city to take from the Water Company all water that it should use during the life of the contract for protection against fire. To this extent at least the proposed erection by the city of waterworks was an impairment of the obligations of the contract, such as gave jurisdiction to the court in equity. (Walla Walla case, supra.)

The bill presented other reasons for the interposition of a court of equity. It is a suit by a trustee for bondholders under

"a deed of trust by way of a mortgage." The security thus created for bondholders was a trust fund. The subject matter of the suit was the protection of a trust fund against threatened injury and destruction.

In order to protect the security, money had to be raised and employed by the trustee, and thereby, the interests of the *cestuis que trust* were preserved. The bill prays for specific performance, and the right to specific performance is discussed later in the brief. Without anticipating that discussion at this time, we submit that it is at least within the powers of a court of equity to lend its aid to the trustee in the expenditure of money for the bondholders, for the purpose of enabling the Water Company to specifically perform its part of the contract pending the litigation, and after the city by its wrongful course of conduct had destroyed the power of the Waterworks Company to raise the necessary revenues for the purpose.

VI.

The contract between the City of Dawson and Bennett, which by transfer became the property of the Dawson Waterworks Company, will be found on pages 288 to 291 of the Record. The charter of the City of Dawson will be found on pages 220 to 229 of the Record.

The charter does not in express terms confer power to contract for water, but it contains what is commonly called a "General Welfare Clause," and this confers ample power to contract for a water supply.

1st Dillon, 4th edition, section 146, and authorities cited.
5 Ga. 561.
28 Ga. 50.
43 Ga. 67.
96 U. S. 341.

The contract between the City of Dawson and the Water Company was made in the form of an ordinance.

The power to contract by ordinance is undoubted.

18 Grattan, 517.

Next to the last paragraph of the ordinance also declares that it shall have the force and effect of a contract.

VII.

One question made by the Appellant in this case is, that the contract between the City of Dawson and the Waterworks Company, whereby the City obligated itself to pay annually a certain sum for hydrant rentals, and obligated itself to levy and collect, in every year, a tax for the payment of rentals of that year, creates a debt, and inasmuch as the State Constitution provides that no debt shall be created by a municipality without the sanction of a vote of the qualified voters of such municipality, that the vote required by the Constitution was not had, and therefore, the contract is void.

Our reply is, this contract does not create a "debt."

If the contract between the Appellant and the Waterworks Company had provided that at the beginning of each year the Appellant should enter into a contract for water for the current year, to be paid out of taxes of that year, it is not reasonable to suppose that any court would hold that such a contract created a debt within the meaning of the term "debt" as used in the Constitution of this State.

It is difficult to understand how the present contract can be held to be in any wise different from a contract of the kind just stated.

The obligation to take water for a period of years does not of itself create a "debt," for something is to be done in each year by the water company; and the city is to pay for the water as it receives it, that is, as the service is performed in each year by the water company.

Such a contract is simply an obligation to make the expense

of water supply a current, or ordinary, expense for each year during the life of the contract, and to be paid out of the current revenues of each year.

We are supported in this contention by the following authorities:

City of Valparaiso *vs.* Gardner, 97 Indiana 1, reported in 49 American Report, 416.
East St. Louis *vs.* East St. Louis, 98 Ill. 415.
31 Ill. Appeal, 325. See specially pages 339 and 340.
Weston *vs.* City of New Syracuse, 17 N. Y. 110.
Fall *vs.* Hazelrig, 45 Ind. 576.
Grant *vs.* City of Davenport, 36 Iowa, 396.
Water Company *vs.* Woodward, 49 Iowa, 58.
Utica Waterworks Co. *vs.* City of Utica, 31 Hun. 430.
Woods *vs.* City of Oklahoma, 2 Oklahoma, 158.
Crowder *vs.* Town of Sullivan, 128 Ind. 486.
Stedman *vs.* City of Berlin, 73 N. W. Rep. 57; 70 N. W. Rep. 739, reporting same case in 101 Iowa, 667.
New Orleans Gas Light Co. *vs.* City of New Orleans, 42 La. Ann. 188; 7 Southern Rep. 559.
Smith *vs.* Town of Dedham, 144 Mass. 177 (10 N. E. R. 782).
Saleno *vs.* City of Neosho, 127 Mo. 627; 30 S. W. R. 190. 128 Mo. 188; 31 S. W. R. 756.
Appeal of the City of Erie, 91 Penn. St. 398.
42 La. Annual 188—see page 191.
City of Danville *vs.* Danville Water Co. 180 Ill. 244; same case 54 N. E. Rep. 224.
Coles County *vs.* Goehrilg, 70 N. E. Repr. 610 (decided by Supreme Court, Ill., 1904).
Wade *vs.* Borough of Oakmont, 165 Penn. State, 479 (30 Atlantic Rep. 959).
Raton Waterworks Co. *vs.* Town of Raton, 49 Pac. R. 98. 67 Ga. p. 107.

It is useless to cite further authority on this question, as this

Court, in Walla Walla *vs.* Walla Walla Water Co., 172 U. S. p. 1, has decided that a contract of the kind now before the Court did not create a debt. On this point, in that case, the Court said:

> "But we think the weight of authority, as well as of reason, favors the more liberal construction, that a municipal corporation may contract for a supply of water or gas, or a like necessity, and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rental during the life of the contract may exceed the amount of the indebtedness limited by the charter. There is a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party perform the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as by the issue of railway bonds, or for the erection of public improvement, though such debt be payable in the future by installments. In the one case the indebtedness is not created until the consideration has been furnished; in the other, the debt is created at once, the time of payment only being postponed.
>
> "In the case under consideration the annual rental did not become an indebtedness, within the meaning of the charter, until the water appropriate to that year had been furnished. If the company had failed to furnish it, the rental would not have been payable at all; and, while the original contract provided for the creation of an indebtedness, it was only upon condition that the company performed its own obligation. Wood *vs.* Partridge, 11 Mass. 488, 493. A different construction might be disastrous to the interests of the city, since it is obviously debarred from purchasing or establishing a plant of its own exceeding in value the limited amount, and is forced to contract with some company which is willing to incur the large expense necessary in erecting waterworks upon the faith of the city paying its annual rentals."

Again the Court say:

> "The obvious purpose of limitations of this kind in mu-

nicipal charters is to prevent the improvident contracting of debts for other than the ordinary current expenses of the municipality. It certainly has no reference to debts incurred for the salaries of municipal officers, members of the fire and police departments, school teachers, or other salaried employes, to whom the city necessarily becomes indebted in the ordinary conduct of municipal affairs, and for the discharge of which money is annually raised by taxation. For all purposes necessary to the exercise of their corporate powers they are at liberty to make contracts, regardless of the statutory limitation ; provided, at least, that the amount to be raised each year does not exceed the indebtedness allowed by the charter. Among these purposes is the prevention of fires, the purchase of fire engines, the pay of firemen, and the supply of water by the payment of annual rentals therefor."

VIII.

Every decision by the Supreme Court of Georgia which construed the term "debt," in respect of a contract of this character made prior to the date of the contract with the City of Dawson, and, prior to a large expenditure of money on the faith of the contract, is in line with the decisions cited in this brief.

In Mayor of Rome *vs.* McWilliams, 67 Ga. 107, will be found the first case in which a contract of the character at bar was construed, that is, this is the first decision upon the question, whether a contract for work, or service, to be performed, and paid for as performed out of the current revenues, constituted a debt.

In that case the majority of the Court decided that such a contract did not create a debt.

The Court said:

"The obligation to pay so far as the *time* of its inception as between the parties is concerned, is one thing, and an actual *indebtedness* within the meaning of the constitution

is another. I may enter into a contract for an architect to build me a house, but if he never does the work I owe him nothing; so if I pay him as he progresses, I will not be his debtor; so if I contract to pay him when the work is done, I owe him nothing till the contract is fulfilled, and if on its fulfillment I discharge it, I can not be said to have incurred a debt in the sense the constitution prohibits corporations from incurring."

At the date of this decision the court was composed of three judges, a majority of whom, two, could make a final decision and judgment.

See Code of Ga. of 1882—sections 210, 213 and 219.

The main opinion was delivered by Mr. Justice Speer, and concurred in by Chief Justice Jackson, who expressly concurs "in the reasons and conclusions given by Judge Speer."

It is claimed by the counsel for appellant, that the court had previously decided otherwise, in Hudson *vs.* Mayor of Marietta, 64 Ga., and in Spann *vs.* Board of Commissioners, 64 Ga. 498.

It will be seen that Mr. Justice Jackson, afterwards Chief Justice Jackson, delivered the opinion of the court in both cases last cited, and in his concurring opinion, as Chief Justice in the 67th Ga., he clearly draws the distinction between those two cases and the case in the 67 Ga. *supra*.

Mr. Justice Crawford dissented on the ground that the contract in question created a debt. See 67 Ga. 117. But it is a singular fact that Mr. Justice Crawford never referred to the decisions in 64 Ga., *supra*, in support of his dissenting opinion, nor does he allude in any manner to said decisions. His silence on that subject is clear proof that he agreed with Judge Speer, who delivered the main opinion, and with Chief Justice Jackson, who concurred in the main opinion, that the cases in the 64 Ga., *supra*, had not decided the question then before the court.

Mr. Justice Crawford was of the opinion that "it is the incurring a new debt, whether paid when the work is done, or five

years thereafter; it is a debt from making the bargain until paid."

Thus it will be seen that Judge Crawford was of the opinion that a mere bargain, an agreement, even though the cash was to be paid when the work was done, or the thing bargained for should be delivered, would constitute a debt from making the bargain.

In this view, Judge Crawford has never been sustained by any court. The Supreme Court of Georgia, in Conyers *vs.* Kirk & Co., 78 Ga. 480, in passing upon a contract which obligated the town to pay a certain sum for lamps when they should be delivered, said:

"If we take the evidence, as we do, most favorably to the plaintiffs, there was no intention that any debt should arise. It was contemplated that payment should be made as soon as the articles were delivered."

And further:

"The debt resulted from a breach of the contract, not from the making of it. Against paying a debt so originating, there is no constitutional impediment."

Our contention is that the contract with the city of Dawson for water supply was for the cash payment for water used in each year, and to be paid for as current or ordinary expenses out of the current revenues of each of such years.

It was not a contract for work done presently, and to be paid for in the future, as would be the case of a bonded indebtedness, notes or other obligations for the payment of money at some future time.

The next decision by the Supreme Court of Georgia, to which any special reference is made as to the validity of a contract like the one at bar, will be found in Lott *vs.* Mayor & Council of Waycross, 84 Ga. 681. In this case the Court said that the validity of a contract for lights running through a series of years was not before the Court, and then added:

"It is clear to our mind that the Mayor and Council of Waycross have a right to contract an annual indebtedness for the purpose of supplying lights to the town; and we do not think such contract would be an indebtedness such as is required by the constitution to be submitted to the vote of the people of the town."

The contract in the case at bar was made February 21, 1890, and the decision in Lott *vs.* Mayor & Council, *supra*, was handed down on March 14th, of the same year. The water company had a right to regard this decision as favorable to a contract of the kind at bar, and it went forward and expended a large sum of money in laying pipes, and erecting and putting in operation a water plant.

The profession of the State generally so regarded this decision, for it is difficult to see how there could be any distinction in principle between a contract made in each year for a supply of water in that year, and a contract to supply water in each year for a term of years, and the water to be paid for as furnished in each year out of the revenues of that particular year. In either case, the water furnished in any particular year would be paid for out of the revenues of that particular year. That is to say, a debt would not be created in any year, under either contract until the water should be furnished and there should be a refusal to pay; in other words, "the debt would result from a breach of the contract, not from the making of it."

This Court so understood the decision in Lott *vs.* Mayor & Council, 84 Ga. *supra*, for the Court cites this decision in support of its decision in Walla Walla *vs.* Walla Walla Water Co., 172 U. S. 1.

If this decision did not warrant the construction placed upon it, as above indicated, then it is quite clear that nothing adverse was hinted, and there was no reference to the decision in 67 Ga. *supra*, by the Court, although it was cited on the brief of counsel.

If the decision by the Supreme Court of Georgia in 67 Ga., *supra*, is, as we claim it to be, and its plain language can not be construed to indicate otherwise, then there was a decision by the Supreme Court of Georgia, at the date of the contract at bar, which would upold this contract as constitutional.

The Supreme Court of Georgia, in Dawson vs. Dawson Waterworks Co., 106 Ga. 696, undertook to distinguish the decision in 67 Ga., *supra*, and finally concluded that there was no real conflict in the two decisions. We do not see how the Court could have reached their decision in 106 Ga. 696, for the language we have hereinbefore quoted from the decision in 67 Ga. construes a contract of the character of the one at bar, not to create a debt—exactly in line with the decision in Walla Walla, and other decisions cited by us, while the Court in 106 Ga., *supra*, decides the very reverse.

But suppose that the Court in 67 Ga. did not decide the question as we claim, and as its plain language obviously imports there is certainly nothing in the decision to the contrary of our contention, or the Supreme Court in the 106 Ga. would have cited it as authority, instead of making an effort to show that there is no real conflict between the two decisions.

If this be the correct view of the decision in 67 Ga.—that is, that it does not decide either way on this question, then up to the time, and for some time after this contract was made, there was no decision by the Supreme Court of Georgia on the question, for it was held by the Court in the 67 Ga. that the two cases in the 64 Ga., *supra*, did not decide this question—and certainly no one will claim that Lott vs. Mayor & Council, 84 Ga., *supra*, was an adverse decision.

If the reasoning of the Court in 106 Ga. is correct, then this question—the construction of the term "debt" as applied to a contract of the character of the one at bar—was an open one when this contract was made, and remained so until August 1st, 1892, when the decision in the 89 Ga. 683, which is adverse to our contention, was rendered. When this last decision was rendered, the waterworks had been completed, the bonds had been issued and sold, and the water company had furnished water for about one year under the contract with the city. The works were completed and accepted August 12th, 1891. See page 307 of the record.

The situation up to August, 1892, was this: If the case in 67 Ga. does decide as we claim, then there was no prior decision in conflict therewith; so it is decided in that case, and there was no decision thereafter adverse to our contention until some time after the completion of the waterworks, the issue of bonds, etc., 89 Ga. 683, and the United States Court will not follow the last decision, even if the United States Courts are bound by the decision of the State courts in construing the term "debt."

If the decision in 67 Ga. did not decide the question as we contend, then there was never a decision by the Supreme Court of Georgia on this exact question until after the waterworks had been completed, put in operation, and the bonds had been issued and sold. This being true, the United States Court will not be bound to follow such decision.

We reiterate the statement, that the first time the term "debt" was construed adverse to our contention, as applicable to a concontract of the character of the contract at bar by the Supreme Court of Georgia, was in August, 1892, in what is called a "headnote decision," 89 Ga. 683. And the cases cited by appellants, and by the Supreme Court in 106 Ga., in support of the opposite contention, which were made prior to 1892, are easily distinguishable from the case at bar. The distinction between the contracts in those cases and the contract in this case is clearly and strongly stated by the Supreme Court of the United States in Walla Walla *vs.* Walla Walla Water Co., 172 U. S. 1.

The Supreme Court of Georgia, in 106 Ga., *supra*, refers to some decisions in support of the conclusions therein reached, but the slightest examination will disclose the fact that these decisions did not construe the term "debt" as applicable to a contract of the character of the contract in the case at bar. We now proceed to state the real points decided in the cases referred to by the Supreme Court of Georgia, to wit: the cases in the 64th Georgia and 74th Georgia.

We will state in brief, the points decided in the cases in 64 and 74 Georgia Reports, *supra*.

In 64 Georgia, 286, the town of Marietta made an exchange of its old for a new fire engine, agreeing to pay, in the *future*, $3,000 for difference in value of the two engines. Some citizens and taxpayers of the town filed a bill to enjoin the municipality from making the exchange of engines. The Mayor and Council admitted that they had agreed to create a debt; but set up that it could be easily met by taxation. It was also admitted that the people voted on the question simply of "exchange" or "no exchange." The Court held that this contract did create a debt, and that the proposition to exchange had not been submitted to the voters of the city according to any law of the State "*or of the city* prescribed for such an election at any time," and the Court accordingly held the contract to be void. It was held that the election was void because there was no law of the State, "*or of the city*" which authorized it.

In 64 Ga., 498, there was a purchase of iron safes by the County of Webster. After these safes were purchased and had been delivered, the county authorities levied a tax to pay for them, and it was held that the county had created a debt, and without the sanction of a vote by the people, the contract was void, and the tax could not be levied for paying said debt.

See 67 Ga., 116, wherein it is said that these decisions are not applicable to a contract for erecting a public building, and to be paid for as it is being built, or when finished—*i. e.*, the character of the contract in the case at bar.

The comments found in 67 Ga., 116, on the two decisions in the 64 Ga., *supra*, are by Chief Justice Jackson, who, as Associate Justice, delivered both opinions of the court in the 64 Ga.

It is claimed by counsel for appellants that the decision in 67 Ga., 107, simply decides that as there was, or would be, money in hand to pay for the buildings, the Court held the contract did not create a debt. We call attention to the reasons given by Judge Speer above in this part of the brief, for upholding that contract—a contract of the character of the one before this court. And we call attention to the concurring opin-

ion of Judge Jackson, wherein he says "I concur in the *reasons* and conclusions given by Judge Speer."

We do not see how any one can claim that the two cases in 64 Ga., *supra*, construed a contract of the character of the one at bar, or contend that the "reasons" given and the "conclusions" drawn by Judge Speer, concurred in by Chief Justice Jackson, in 67 Ga., 107, do not support our contention, to-wit: That at the date of the contract in the case at bar the only decision upon a contract of its character was that such a contract did not create a debt. See pages 27 to 32 both inclusive of original brief.

74 Ga., 845, is cited by counsel for appellants as deciding adverse to our contention. In that case the Ordinary of Habersham county contracted to pay for certain wrought-iron work which had been done for the county, on the 25th day of December, 1884, and if not paid at that date, the contract should bear interest at the rate of eight per cent. per annum. The Court, speaking through Chief Justice Jackson, decided that this contract created a debt. The work had been done, and was to be paid for in the future. The contract in that case was not of the character of the one at bar, where no debt can possibly arise, if the contract is complied with, for as the water is furnished in each year, it is to be paid for out of the revenues of that year.

It is well to remember that the judge who delivered the opinion in the last cited case, concurred in the opinion in the 67 Ga., *supra*, and in that concurring opinion stated that the two decisions in 64 Ga., *supra*, did not decide the validity of a contract of the character of the one at bar. This judge did not suppose for one moment that any one would ever contend that there could be any conflict between the decision in 67 Ga., *supra*, and the decision in 74 Ga., *supra*, for the contracts are totally unlike.

IX.

We insist that the decision in the 98 and 106 Ga., *supra*, are not binding on this court, because it is not such a construction of the State constitution that the United States Courts feel that they are bound to adopt and follow, but it simply construes the term "debt"—that is, decides what constitutes a debt. This was a decision of a question of general law, which a United States Court will decide for itself.

107 U. S., 33–102–529.
12 Howard, 139.
161 U. S., 149.

X.

But if the decisions in the 89 Ga. and 106 Ga., *supra*, be treated as a construction of the State constitution, we say they should not be followed by this court, because the contract in the case at bar had been made, the waterworks had been erected and put in operation at a large outlay of money, and the bonds, secured by a mortgage thereon, had been issued and sold before any adverse decision had been made.

To follow the later decisions of the State Courts construing State laws, after contracts had been entered into, during a time when the construction placed upon such laws was different, would be for the Federal Courts to abdicate their high constitutional function of upholding unimpaired the obligation of contracts.

This court has repeatedly held that the Federal Courts will not follow decisions of the State court construing State laws where contract rights which have accrued prior to the rendition of such decisions might be thereby injuriously affected; but in all such cases will exercise, and will uphold all contract rights based upon earlier decisions, or upon a natural and sound interpretation of the laws themselves, in the absence of such decisions at the time the contract was made.

The leading case is Douglass *vs.* Pike County, 101, U. S. 677, where the rule is laid down:

> "This Court treats the construction which the highest court of a State has given to the statute of the State as a part of the statute.
>
> "But where different constructions have been given to the same statute at different times, it will not follow the latest decisions if thereby contract rights which have accrued under earlier rulings would be injuriously affected.
>
> "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, not retroactive."

See cases therein cited.

See also, 8 Wallace, Butz *vs.* City of Muscatine, where the Court say that the relator's "right can no more be taken away by subsequent judicial decisions than by subsequent legislation. It is as much within the sphere of our power and duties to protect the contract from the former as from the latter, and we are no more concluded by the one than the other."

It would needlessly consume the time of the Court to encumber the brief with the long line of decisions upon this subject.

We, however, cite a a few recent decisions which have applied the principle to cases somewhat like the case at bar:

89 Fed. 257, Coler *vs.* Board of Commissioners of Stanley County.

85 Fed. 359, Bartholomew *vs.* City of Austin, Texas.

90 Fed. 7, Union Bank *vs.* Board of Commissioners, etc.

89 Fed. 123, Vermont Loan and Trust Co. *vs.* Dygert.

83 Fed. 403, Cæsar *vs.* Capell.

79 Fed. 477, Jones *vs.* Great Southern F. P. Hotel Co.

88 Fed. 749.

XI.

It is claimed by appellants, that the decision of the Supreme Court of Georgia in City of Dawson *vs.* Dawson Waterworks Company adjudicated the rights of complainants (the appellee) under the contract between the city and the waterworks company, and that the appellee is estopped thereby from again calling in question the meaning of the term "debt." This point is presented to this Court by the fifth assignment of error.

We think it clear that the Trustee is not estopped by that decision, and for the following reasons:

(a) Estoppels are not favored by the Courts—they are odious—and he who alleges an estoppel must clearly establish it. The burden is on the defendant to establish the estoppel in this case, and if the Court has a doubt on the subject, the defendant must lose on this point.

(b) A judgment is not an estoppel, unless it be for the same cause of action, and is between the same parties, and for the same right.

45 Cal. 439.
Code of Ga. of 1895, Section 3741.
Black on Judgments, Sec. 534, pp. 809 and 810.
64 Hun. (N. Y.) 202.
98 E. Y. 311.

(c) In City of Dawson *vs.* Dawson Waterworks Company, the suit was for water rental for the year 1895. This suit is for water rental for 1896, 1897 and 1898, and under the contract the water rental of each year is a separate and distinct contract, or cause of action, for the payment of rental for each year depended upon the performance of the terms of the contract by the water company in that year.

50 Fed. 690.

Hence, we insist, that the cause of action in the two suits is not the same.

(d) It is insisted by appellant that a decision by the Supreme Court of this State of the meaning of the term "debt," is binding upon the parties in any future action to recover water rentals, although the rental of each year may be a new cause of action. This we deny—the decision by a Court of a point in one case is not *res adjudicata* as to that point in another suit for a different cause of action.

(e) But if this contention be not sustained, we say a judgment will not estop any one but parties or privies. It is not pretended that the present complainant was a party to that suit, but on the contrary the evidence is overwhelming that the Trustee was never advised of that suit—never heard of any controversy between the City of Dawson and the Water Company—interest was paid regularly on the bonds, and it supposed the interest was paid by the Water Company, until after the decision by the Supreme Court of this State had been made. It, therefore, follows, that the trustee was not a party, either directly or indirectly to that suit.

(f) As the trustee was not a party, then the question arises, was it a privy. The trustee was not a privy unless it was so identified with the Water Company in estate, or in law, as to be affected by the acts of the Water Company in that litigation. We say it was not the privy of the Water Company, so that the acts of the Water Company, short of collecting the rentals, *i. e.*, benefiting the estate, would be binding upon the trustee.

(g) If the trustee be treated as privy to the Water Company, in the relation of mortgagor or mortgagee, then we insist that no act done by the mortgagor, without the consent of the mortgagee, after the date of the mortgage, which is not beneficial to the estate, could bind the mortgagee—and no judgment rendered against the mortgagor after the date of the

mortgage, to which the mortgagee was not a party, could conclude the mortgagee.

169 U. S. 243.
130 U. S. 493.
152 U. S. 301.

(h) The contract between the Water Company and the City of Dawson obligates the city to pay the rentals to the Water Company, "*or the trustee for its bonds.*" Now if the rule applicable to joint makers of notes is made applicable to these *several payees*, for they are made several by the express language of the contract, then the judgment against the Water Company, to which the trustee was not a party, does not bind the trustee.

44 Fed., 49.
55 Vermont, 329.
14 Iowa, 47.

(i) If the relation of the trustee to the mortgagor be treated as the relation of one tenant in common to another, then the judgment is not binding upon the trustee, for it was not a party.

47 Fed., 547.
52 Texas, 383, which was reaffirmed in 58 Texas.
Freeman on Co-Tenancy, par. 168, p. 245 (2d Edition.)

The trustee and the waterworks became the joint owners of the rental of each year under the contract, they stand before the court as tenants in common in respect of this right. Either had the right to collect the rents, and either has the right to sue for the same. Had the suit by the water company been productive, it would have been beneficial to the estate, and as a consequence to the trustee, but the trustee is not concluded by an unproductive suit of the water company, unless it was a party.

52 Texas, 583, and other authorities cited.

(j) The contract makes the trustee and the water company alternative payees, in severalty, not jointly, and if they are in law related to each other as are the holders of notes made as part of the same transaction, a judgment against the holder of one of such notes does not affect the holder of another note, who was not a party to such a suit.

41 Iowa, 513.

(k) Our contention is that the trustee in this case stands upon a better footing than the holder of such note. The promissory notes referred to in the case quoted were parts of one closed transaction—but not so with the yearly water rentals in this case. The contract was made to cover several years, but the water company was to perform certain service in each year, and for that certain service to be performed in each year the city was to pay to the water company, "or to the trustee," a certain amount of rentals for the service of that particular year. In other words, the obligation was for services in the future, and the water company was required to do certain things in each successive year to earn the rental of that year. Hence, the contract for no one year was completed, but under the very terms of the contract an obligation would arise to pay rental in each year provided the service was rendered in that year. Hence we insist that liability for rent of any one year is a separate and distinct liability from that of any other year, and a suit for the rentals due for 1896, 1897 and 1898, is not for the same cause of action as that contained in the suit for rentals due for the year 1895. They are separate and distinct causes of action. The trustee has the right to bring this bill for the protection of the rights of the holders of the bonds, and this suit can not be affected by any decision, on any point, in any case, by any court, prejudicial to the interest of the trustee where it was not a party.

The trustee had the right to sue as alternative payee, and would not be concluded by a judgment against the other alternative payee, suing for a different payment, though the same defense should be made in both suits.

Durham *vs.* Evans, 2 McLean Reports (circuit court), p. 139.

Nor would the trustee, suing as mortgagee (and even if we leave out of the consideration the fact that defendant's contract made the trustee alternative payee) be bound by the result of a suit brought by a mortgagor.

130 U. S. 493, Hassall *vs.* Wilcox.
152 U. S. 301, Keokuk & Western R. R. Co. *vs.* State of Missouri.

We think the authorities sited abundantly established the proposition that no judgment rendered in a suit by the Dawson Waterworks Company for the water rental for the year 1895 could by any principal of *res adjudicata* bind or affect the rights of the trustee for bondholders who is suing in the present action to recover the rentals for the years 1896, 1897, and 1898, under express contract right contained in the contract of February 21, 1890 (Exhibit B of bill), and also conferred by the mortgage of September 1, 1891 (Exhibit A of bill). Nor can such judgment affect the right of the trustee to proceed in and by the present bill to ask an injunction to enjoin the city from erecting waterworks of its own, in violation of its contract, and from doing the other acts whereby the rentals and other revenues for future years (pledged by the mortgage) will be cut off, and the mortgaged property largely destroyed.

(1) But another and complete reply to defendant's contention that the matter is *res adjudicata* is found in the fact that there has been as yet no final judgment in the case in the State Court. Until there shall be such final judgment, there is nothing that could be pleaded as *res adjudicata* against the Dawson Waterworks Company.

That suit was based on the right of the Waterworks Company to recover for the use of the water by the city for the year 1895. It does not set up the right to recover for the year 1896, or the year 1897, or the year 1898, nor does it set up any

of the equitable rights, or invoke the equitable remedies, and protection, which constitute the trustee's cause of action in the present bill.

There has been no judgment reached in the State Court, which can bind anybody, or conclude anything. The case is still pending in that court undecided.

(m) Even if the decisions of the State Supreme Court were such as might probably lead to a result adverse to plaintiff in that case on the second trial, there would still be no estoppel by judgment on the principle of *res adjudicata* till such trial and final judgment thereon. Until such final judgment, plaintiff can at any time voluntarily dismiss its action, with right to renew it, in the same court, or in a different court.

Code of Georgia, 1895, sections 5043, 5044.

"A matter is not *res adjudicata*, though litigated in the courts of the State, where, after such decision is made, and the case remanded the plaintiff takes a voluntary nonsuit, as permitted by the State law, and no final judgment is entered."

90 Fed. 7, Union Bank of Richmond, Va. *vs.* Board of Commissioners of Oxford, N. C. 1.

Nor does any principle of comity make such decision binding on the Courts of the United States, so as to impeach the validity of contracts, or bonds, regarded as valid at the time they were made. To so hold would be to deprive the parties claiming under such contracts or bonds of the protection guaranteed to contracts by the National Constitution. For, under the provision of that constitution, the obligation of contracts can no more be impaired by judicial decision than by legislation.

Same case, 90 Fed. 7.

And the examination of that case shows clearly that if the Dawson Waterworks Company were now to dismiss its suit in the State Court and sue in the United States Court for the same

year's rental, the United States Court would clearly have jurisdiction by reason of the constitutional questions. Also 172 U. S. I.

XII.

The assignments of error, which allege error in granting the injunction because of a want of equity in the bill, and because there is a remedy at law, and, that the facts do not make a case for specific performance, we will discuss in this division of our brief.

(a) The allegations in the bill, and the evidence snbmitted in support thereof, make this a case for equity jurisdiction.

172 U. S., see page 11, H. N. 3.

90 Fed. 753. See narrative statement of facts in this brief.

(b) The conduct of the defendant is such as to result in the destruction of plaintiff's property, unless it is arrested by injunction. There is, therefore, equity in the bill, and complainant can not have adequate remedy at law.

147 U. S. 248.

(c) The contract between the water company and the City of Dawson obligates the city to pay the rentals to the Waterworks Company, *or to the trustee for the bonds.*

The mortgage made by the trustee for the bonds by the water company covers all of the property of the water company, including the rentals.

It is the water rentals that gives value to the bonds, and in order to fully secure the bonds, the City of Dawson contracted to pay direct to the trustee, and thereby conferred upon the trustee the right to demand and collect the rentals.

The effort is now made to pursue a course utterly destructive of that right, and the trustee can maintain a bill to arrest that course, and compel both of the other parties to the contract to specifically perform the same.

41 S. W. 1015, Ky. Appeals. Strong case.

(d) The City of Dawson, by the express terms of the contract, pledged the rental, in trust, to secure the payment of the bonds and interest, and it is this trust that is now sought to be enforced by specific performance and mandatory injunction. Mandatory injunction is the remedy.

166 U. S. 557.
41 S. W. 1015, *supra.*

(e) The City Council, by ordinance, on June 27th, 1894, repudiated the contract, for the purpose of forcing the water company to sell its plant. See record pp. 316, 317, 318, 319.

On October 4th, 1894, the City Council, by ordinance, ordered an election to be held on November 19th, 1894, to authorize the issuing of $35,000 in bonds for the purpose of purchasing or erecting waterworks.

On November 5th, 1894, the City Council of Dawson postponed the election to December 12th, 1894, "to determine whether the City shall issue $35,000 of 6 per cent. bonds" for the purpose above indicated.

On December 13th, 1894, the City Council declared, by ordinance, that the proposition to issue bonds had been carried.

In March, 1899, the City Council determined to proceed to issue and sell bonds, pursuant to the vote above indicated and to erect waterworks of their own. This is admitted in the answer.

These ordinances impair the obligation of the contract, and bring this case squarely within the Walla Walla case.

185 U. S. 68.
172 U. S. 1. Also,
166 U. S. 557.

In the Walla Walla case the City contracted not to take any interest in any other waterworks. By a subsequent ordinance the City determined to build waterworks of its own, and this Court held that such action impaired the obligation of the City's contract with the water company.

There is no difference in the two cases—in that case the City contracted not to take any interest in any other waterworks, while in the case at bar the *exclusive privilege* to lay water pipes, mains, etc., in the streets was granted in order to furnish the city with water for the life of the contract. This stipulation is just as binding upon the city of Dawson as was the contract in the Walla Walla case, binding upon that city. For, having granted such exclusive privilege to the water company, it could not erect a plant of its own.

39 N. J. Equity, 367.

(f) If the Dawson Waterworks were out of the case, the Court would have jurisdiction of the case as between the Trustee and the City, and for two reasons:

First: Because the obligation to pay water rentals is to the trustee, as hereinbefore stated, and the trustee can sue for any year for which the Water Company has not sued.

Second: The right to sue being in the Trustee, equity has jurisdiction, as the remedy at law is not so complete as in a Court of equity. For, it is necessary to enforce the contract in order to preserve the property of the holders of the bonds, which can not be done in a Court of law.

172 U. S. 1.

(g) After bonds have been issued and sold, and the proceeds used to erect waterworks, neither the City of Dawson, nor the Water Company, nor both combined, will be permitted by a Court of equity to do anything, or omit to do anything, which will destroy the security for the bonds—the contract for water supply and the payment therefor.

XIII.

The appellant contends that the municipal corporation of Dawson had no power, under its charter, to grant an exclusive

franchise, and such a grant is contrary to the Constitution of of Georgia.

We insist, first, that this contention is unsound, and second, if the contention that the city had no power to grant an exclusive franchise be sound, the city can not resort to such claim as an excuse for violating its contract to take water from the water company during the life of the contract.

It will be conceded, we suppose, that the "general welfare clause of the charters" confers the power upon a municipal corporation to contract for water. See authorities cited in the sixth division of this brief.

In the 106 Ga., *supra*, p. 709, in discussing the authority of the City of Dawson to make a contract for water, after stating that said City could raise a tax sufficient to pay for water for domestic use, and to protect the inhabitants against fire, the Court said:

> "A supply of water for these purposes may be procured by a municipal corporation either by building itself the *works necessary* for the purpose, or by making a contract with other persons to supply the same."

If the city could build waterworks, it certainly could lay its mains and pipes in the streets, for without them the water could not be distributed through the city. If the city could, by contract, procure that to be done which it could itself do, then it follows that the City had the power to grant to the Water Company the right—franchise—to use the streets for laying mains, pipes, etc.

The inhibition in the Constitution of Goorgia against making irrevocable grants is contained in article 1, section 3, paragraph 2, of the Constitution—section 5730, Code of 1895, and that provision is as follows:

> "No bill of attainder, ex post facto law, retroactive law, or law impairing the obligation of contracts, or making irrevocable grants of special privileges or immunities, shall be passed."

That provision of the State Constitution is directed against legislative acts and not against the exercise of the business powers of municipalities as the agents of their citizens in contracting for water and other articles for the general welfare of the city. In respect of these matters there is no express inhibition in the Constitution or Statutes of Georgia against the grant of an irrevocable franchise by a city.

But if it be true that the constitutional provision on this subject applies to the grant of an exclusive right by a city to a water company to occupy its streets, then we insist that the City of Dawson having granted such exclusive right can not withdraw it, because the withdrawal thereof would do great injustice to the Water Company and its creditors, *i. e.*, the holders of its bonds.

Article 1, section 3, paragraph 3, of the Constitution of Georgia—Code of 1895, section 5731, provides as follows:

> "No grants of special privileges or immunities shall be revoked, except in such manner as to work no injustice to the corporators or creditors of the incorporation."

While we do not concede that the City of Dawson could revoke the grant of the exclusive right to occupy its streets made to the Dawson Waterworks Company under the circumstances, yet if it does so it must be done on such terms, and under such regulations, as "will work no injustice to the corporators or creditors of the incorporation."

The City of Dawson has not attempted to revoke the exclusive right to occupy its streets granted to the Dawson Waterworks Company, in order that another company might be authorized to occupy its streets, but the city has undertaken to revoke its solemn contract made with the Dawson Waterworks Company in order to force the Dawson Waterworks Company to sell its property to the City, or for the purpose of erecting waterworks of its own, in violation of its solemn contract with the Waterworks Company. This, we apprehend, no court will hold the City can do.

We doubt if the City could be heard to raise the question, *i. e.* that it had transcended the law in granting an exclusive right to the waterworks company to lay its pipes in the streets of the City.

36 Iowa, 396 (7).
10 N. W. 886, bottom p. 888.
35 Pac. Rep. 693, bottom p. 696.

If it be true that the City of Dawson could not grant the exclusive right to the Water Company to occupy the streets with its pipes, etc., yet said Water Company has the right, under the terms of the contract, to occupy the streets for the purpose for which the right was granted during the life of the contract with the city, and during that period the city would be bound, under the terms of the contract, to receive and pay for water according to the terms thereof, for the city certainly possessed the power, as an incident to its principal undertaking to "bind itself to carry out the contract in good faith, and with decent regard for the rights of the other party."

Walla Walla *vs.* Walla Walla Water Co., 172 U. S. 18.

To permit the City of Dawson to erect waterworks of its own to supply itself with water for fire protection, when it had by contract agreed to take the water furnished by the Wateworks Company for this purpose during the life of the contract, and that it would pay the stipulated price therefor, is to permit it to violate the express terms of the contract. To furnish water to the inhabitants when it had agreed by contract that such water was to be furnished by the Water Company during the life of its contract, and thereby enter into ruinous competition with the Company, is certainly contrary to "the fair intendment of the contract" even if the contract contained no express provision on the subject.

Walla Walla *vs.* Walla Walla Water Co. 172 U. S. 1, on pages 17 and 18.

Aside from the question of whether or not the city could grant the exclusive right to the Waterworks Company to lay its pipes in the streets, we insist that the stipulations entered into between the City of Dawson and the Dawson Waterworks Company make a contract for the exclusive right of the Waterworks Company to furnish water to the city, and the duty on the part of the city to take water exclusively from the Waterworks Company during the life of the contract.

(a) The attention of the Court is called to the first paragraph in the contract between the City of Dawson and the Dawson Waterworks Company, found on page 288 of the printed record in this case. That portion of the contract provides that: "The City Council of the City of Dawson, Ga., do hereby grant to R. L. Bennett, of Philadelphia, Penn., and his associates, their successors and assigns, who are to organize a company to be styled 'The Dawson Waterworks Company,' the exclusive right and privilege for a period of ninety-nine years, of constructing, maintaining and operating a system of waterworks for the purpose of supplying said city and its inhabitants with water for protection against fire, and for domestic, sanitary and other purposes."

(b) This gives to the Dawson Waterworks Company the exclusive right and privilege of constructing, maintaining and operating a system of waterworks for the purpose of supplying said city and its inhabitants with water for protection against fire, and for domestic, sanitary and other purposes. This exclusive right to furnish water has no reference whatever to the exclusive franchise to use and occupy the streets, which will be found in the second paragraph in the contract. (Printed record, page 288.)

(c) Attention is called to section 10 of the contract, and found on page 290 of the printed record, and which is as follows:

> "That full assent is hereby given to a charter to be granted by the Legislature of the State of Georgia, to the said R. L. Bennett and associates, their successors and assigns, or to be obtained by them, under the general incorporation laws of said State incorporating them, into a

body corporate, under the title of the Dawson Waterworks Company, and granting to said company the exclusive right to contract, maintain and operate a system of waterworks in said city of Dawson, for the purpose of supplying said city, its inhabitants, citizens, residents with water for protection against fire, and for domestic, sanitary and other useful purposes, and to make such reasonable rates and regulations for the government of private consumers in the price of water, and to charge such rates therefor as the said company may determine upon. Provided, the rates do not exceed those established by this ordinance."

(d) Here, again, is an explicit agreement on the part of the City of Dawson that the Dawson Waterworks Company shall have the exclusive right to construct, maintain and operate a system of waterworks in the city of Dawson for the purpose of supplying said city, its inhabitants, residents, etc., with water; which is just as strong as was the contract in the Walla Walla case that the City of Walla Walla would not take water from any other company, because the exclusive right given to the Dawson Waterworks Company to furnish the city and its inhabitants with water, excludes all idea that the City could take water from any other source.

(e) The last paragraph in section 4 of the contract (printed record, page 289, provides as follows:

"The said company, and their successors and assigns, shall be, and are required, from the completion of their system of waterworks till their charter shall cease, to furnish a sufficient supply of water for the purposes before and hereinafter mentioned, unless prevented by unavoidable and providential causes. In such event they shall be allowed a reasonable time to make repairs, and if, after such reasonable time has been allowed, they should still fail to furnish said supply of water, their franchise from that fact be forfeited."

Here we have a stipulation that if the water company does not furnish both the city and its inhabitants with water, that the contract would be forfeited, thus showing that it was compulsory on the part of the Waterworks Company to furnish the city as well as the citizens, and that under the terms of the con-

tract the City obligated itself not to take water from any other source, nor should its citizens take water from other sources by its consent or procurement.

(f) Section 2 of the contract, and reported on page 288 of the record, provides for an exclusive right and authority to lay water pipes, mains, etc., in the streets. We have discussed the validity of this franchise elsewhere in this brief. But, if it be true that this exclusive franchise to use the streets could not be granted, this fact can not in any wise affect this case, for we rely upon the fact that the contract, in the sections above quoted, show that the City of Dawson made a contract with the Dawson Waterworks Company to take water exclusively from that company and none other, both for its own use and for the benefit of its citizens, and brings the case squarely in line with the Walla Walla case in 172 U. S., where there was an agreement on the part of the City of Walla Walla not to take water from any other company, or any other source than from the Walla Walla Water Company.

The fact that the contract with the City excluded the city from getting water from any other source, did not render it void.

> Davenport Gas and Electric Co. *vs.* City of Davenport, 98 N. W. Rep. 892. Head-note 6, p. 896 (Supreme Court of Iowa, 1904).

The cases cited by the appellant in the court below, to sustain the proposition that the City had no power to grant to the Waterworks Company the exclusive right to lay water-pipes in the streets, etc., will be found on examination not to conflict with appellee's position in this case. Two of these are cases of exclusive grants to street railways. The case in 28 Fed. 529, is readily distinguishable from the present case, and this fundamental distinction was in the mind of Judge Brown, who, after quoting from a case somewhat similar to the case at bar (which was relied on by one of the parties), uses this language:

> "We can not assent to a similar interpretation of the franchise in this case. The City (in the case before Judge

Brown) does not obligate itself to take any particular quantity of gas, or to continue the exclusive employment of gas for a definite period. The contract between the City of Munich and the Gas Company is not set forth in the opinion, but the language would indicate that the City bound itself in terms to have its streets lighted with gas. If this be so, the case differs very materially from the one under consideration."

28 Fed. 539.

The other case cited by appellant is similar in its facts to the last; although some of the language used may be broader than a decision of the case required.

The distinction between these and similar cases, and the case at bar is clearly pointed out by this Court in the Walla Walla case, head-note 6 of opinion, pages 17 and 18, 172 U. S.

The exclusive right to lay pipe was given to the Dawson Waterworks Company, and the City can not repudiate the contract, and the trustee, who holds a mortgage on all the rights of said company, will be protected by a court of equity.

Vicksburg Waterworks Co. *vs.* Vicksburg, 185 U. S. 65.
Anoka Waterworks Co. *vs.* City of Anoka, 109 Fed. 580.
115 U. S. 683, 650.
120 U. S. 64.
85 Fed. 359.
39 N. J. Equity 367, Atlantic City W. W. Co. *vs.* Atlantic City, *et al.*
177 Penn. State 643, White, *et al. vs.* City of Meadville.
20 American Reports 283, Stein *vs.* Mayor of Mobile (same case, 49 Ala. 362).

We contend that the grant of exclusive right to the Water Company to use the streets will be construed, at least, as an obligation on the part of the City not to take water from any other source during the life of the contract, and such contract will be enforced by a court of equity.

39 N. J. Equity, 367.

We have carefully read the cases of Bienville Water Supply Co. *vs.* Mobile, 175 U. S. 109; Bienville Water Supply Co. *vs.* Mobile, 186 U. S. 212; City of Joplin *vs.* Southwestern Missouri Light Co., 191 U. S. 150; Defiance Water Co. *vs.* Defiance, 191 U. S. 184; Skaneateles Water Co. *vs.* Skaneateles, 184 U. S. 354; Capital City Light & Fuel Co. *vs.* Tallahassee, 186 U. S. 401; Newburyport Water Co. *vs.* Newburyport, 193 U. S. 561; Gloucester Water Supply Co. *vs.* City of Gloucester, 193 U. S. 580, and Shaw *vs.* City of Covington, 194 U. S. 593; and in none of those cases was there any such contract between the city and the water company as was made in the case at bar. In no one of those cases was there a contract made between the city and the water company for a period of time which the city undertook to revoke.

XIV.

The appellant contends that the evidence shows that the Dawson Waterworks Company failed during the years 1896, 1897 and 1898, to perform its part of the agreement—that it did not furnish water, and was not able to do so during said years.

On August 12, 1891, the Waterworks had been completed, and, on that day, the Mayor and Council of Dawson declared that "after fully testing the system, the same is hereby accepted from this date, in full compliance of the contract, and in many particulars exceeding the contract, and none being less than called for in the contract." Bottom of page 97 and top of page 98 of Record.

Thus it will be seen that in all respects the waterworks were satisfactory when completed, and the evidence does not show any real difference between the works at that date and on any date since. The history of the case set out in the "Statement of Facts" at the head of this brief will show that there was really never any cause for complaint, but the alleged complaints were excuses merely on the part of the Mayor and Council for refusing to pay water rentals.

The defense that the water company did not carry out its contract in any year can not be made available, as the contract points out how complaints of this kind are to be made available, as follows:

> "The said Company and their successors and assigns shal be, and are required, from the completion of their system of waterworks till their charter shall cease, to furnish a sufficient supply of water for the purposes before and hereinafter mentioned, unless prevented by unavoidable and providential causes. In such event they shall be allowed a reasonable time to make repairs, and if, after such reasonable time has been allowed, they should still fail to furnish said supply of water their franchise from that fact be forfeited."

This contract contemplates that complaint shall be made, if the water company fails to live up to its contract in the respects mentioned, and if, after such reasonable time from the making of such complaint, the water company does not make such changes, or repairs, as will give a sufficient supply of water, then the franchise shall be forfeited. In other words, the contract itself provides how, and for what reason, the contract shall be forfeited—and in no other way can it be forfeited. No notice was ever served on the water company that it had not furnished a supply of water, nor was any action taken in respect of the supply or quality of water, but a resolution was adopted declaring the franchise forfeited.

The City of Dawson could not put an end to the contract in this way.

When the waterworks were completed, the city inspected and tested them, and declared, by resolution, that the work was fully up to the contract in all respects, and in some respects exceeded the contract.

This being true, and as the contract provides the method of a forfeiture of the franchise, i. e. the abrogation of the contract, which has not been followed, the City's defense can not avail.

But the evidence shows that no just ground for complaint

exists. If such should exist, the contract affords the remedy. And the remedy provided by the contract should be pursued.

Walla Walla case, *supra.*

No complaint as to the service, or complaint of any character, was ever made to the trustee, nor to the Waterworks Company till years after the City ceased to pay for the service it has never ceased to use. And the evidence shows conclusively that no real ground for complaint ever existed.

If the City claims now that repairs or betterments are needed, with what show of equity can it ask that the Waterworks Company could make these repairs or betterments, when the City is withholding about twelve thousand dollars water-rentals since 1894, which it justly owes for water already furnished and accepted, and when its act in thus withholding money it justly owes leaves the waterworks company without funds or the ability to float further bonds for the purpose of raising funds?

XV.

The appellant contends that the Court did not have jurisdiction, because it appears that the Dawson Waterworks Company should have been a party plaintiff.

In reply to this assignment of error, we call attention to the fact that the trustee prays a specific performance of the contract on the part of the Waterworks Company, as well as the city.

After the decision by the Supreme Court of Georgia in the 106 Ga., the trustee learned for the first time that the city had not paid water rentals since 1894, and that interest on the bonds had been paid with money borrowed by the Waterworks Company of the American Pipe Manufacturing Company. The trustee received notice from the Water Company that it could no longer borrow money for the purpose of paying interest on the bonds, and the Trustee heard for the first time, after the notice had been given that the Mayor and Council had made complaint in regard to the pressure at some one of the water plugs

in the city. The Water Company made known to the Trustee its purpose not to pay any more interest. It had made arrangements to make extensive repairs and improvements of its plant, and give a better service, but after the rendition of said decision, and the action taken by the city to erect a water plant of its own, the Dawson Waterworks Company declined to go on with such repairs and improvements.

It is alleged by the city that the water service is not up to the contract, and by the Water Company that if the service is not up to the contract it is the fault of the city.

The amendment to the bill makes these allegations, and the prayer is that the Water Company be decreed to perform its agreement, and that it be enjoined from refusing to perform the service in strict fulfillment of the contract, and that the city of Dawson be enjoined from breaking and violating its contract.

The mortgage is upon the property of the Water Company and the rentals, and given to secure the payment of the bonds, and unless the contract can be protected, as prayed in the bill and amended bill, the value of the bonds will be practically destroyed.

While the contract sets out the method to be pursued by the city to be relieved of the obligations of the contract because of a failure on the part of the Water Company to live up to it, and while it is true the city has not pursued that course, and can not claim to be relieved, yet the city claims the Water Company will not perform its contract—and for this reason it was proper to make the Water Company a party defendant, and ask that it be required to perform all of its obligations under the contract.

It is for the protection and futherance of the interest of the complainant, as Trustee, that this bill is filed, and the fact that it may result in a benefit to the Water Company is in no sense a reason why said company should not be made a party defendant.

154 U. S. 362, Reagan *vs.* Farmers' Loan & Trust Co., *et al.*

This case rules that the Trustees could sue to protect property which has been mortgaged to secure bonds, and in that case the defendant railroad company filed its answer and cross bill setting up substantially the same rights as the plaintiff.

There is equity in the bill. The complaint is of such conduct as will, unless arrested by the Court, result in the destruction of the complainant's rights.

172 U. S. 1.
118 U. S. 290, 2 H. N.
169 U. S. 466, Smith *vs.* Ames.

Specific performance is prayed for in this case. Specific performance will not be refused, because the contract is continuous, and in its execution judgment and skill will be required.

163 U. S. 564, 8 H. N.
138 U. S. 1, 13 H. N.

Justices Shiras and Gray dissented in the last case, but on another point.

The same doctrine is strongly stated by the Kentucky Court of appeals, reported in 41 S. W. 1015.

See also a decision to the same effect by the Supreme Court of Alabama, reported in 13 Southern R. 682.

XVI.

Appellant contends that there is no diversity of citizenship. This contention is sufficiently answered, we think, by the pleadings and evidence, which show that the Trustee, a corporation existing under the laws of Pennsylvania, has its residence and citizenship within that State—and all the defendants are residents and citizens of the State of Georgia.

This alleged lack of diversity of citizenship proceeds upon the idea that the Water Company should be a party complain-

ant. This contention is answered in the fifteenth division of this brief, and in support of this allegation it is insisted that this is a collusive suit.

This contention is successfully answered by the evidence in the case.

The Trustee did not know, nor did any of the bondholders know, that any litigation was going on. The interest was promptly paid as it fell due, and they thought it was being earned by the property, and that the city was promptly and regularly paying the rentals called for by the contract. Now that the city's continued violation of its contract has so crippled the waterworks company that it can no longer make repairs, or meet interest payments, the Trustee is advised of the facts, and takes steps for the protection of the mortgaged property, in order to save bondholders security from destruction. This it had the right to do, and this it is its duty to do. If the Dawson Waterworks Company should feel friendly to the suit, it could make no possible difference. If they had joined as co-plaintiffs it would make no difference. Under the decision of this Court in the Walla Walla case, supra, the Waterworks Company, if so inclined, could have maintained the suit, or one similar to it. But the Trustee can do one thing the Dawson Waterworks Company could not do. It can ask the Court to expend the earnings, or if need be place a prior lien upon the property, to make repairs and betterments, as may become necessary. The Waterworks Company has declined to act, and it thereby becomes the right and duty of the Trustee to take action to protect the contract and the property, and force both parties to perform the contract.

See authorities cited in the fifteenth division of this brief.

The United States Courts would have jurisdiction of a suit brought by the Waterworks Company, seeking the relief that is sought in the original and amended bill in this case, to the extent of enjoining the City of Dawson from breaking its con-

tract, for a federal question is raised by the pleadings and the pleadings are supported by the evidence.

90 Fed. 753.
172 U. S. 1.

XVII.

The Appellant contends that the decision by the Supreme Court of Georgia, in 106 Ga. supra, concludes the rights of complainant, because the complainant was an original party to the contract, and that the Dawson Waterworks Company transferred the claim of rentals to the Trustee after said decision was made.

It is true that the Trustee is, and was, a party, to a certain extent, to the original contract. The city agreed to pay the water rentals to either the Water Company, or to the Trustee for its bonds—*i. e.* pay to either that might demand them—but the trustee was not a party to that suit, and was in perfect ignorance that there was, or had been, any controversy or litigation between the City and the Water Company until after said decision had been made. We think, for the reasons set out in the eleventh division of this brief, that the rights of complainant are not concluded by that decision.

There was no transfer whatever by the Water Company of any right it had to the trustee after said decision had been made by the Supreme Court of Georgia. There was never at any time, a transfer of any right by the Water Company to the Trustee, except such right of the Water Company that belonged to the Trustee in virtue of, and as an incident to, the mortgage.

The contract between the City and the Water Company contains a stipulation as follows:

"The City obligates itself to pay to said company, or to such trust company as the Dawson Waterworks Company may elect, or decide upon, as trustee for their bonds," etc.

Here is a distinct promise to pay to complainant, who became trustee for the bonds of the water company, and this obligation on the part of the City of Dawson is in no sense an assignment of any interest of the Water Company to complainant. This stipulation required the City of Dawson to pay direct to the trustee, if payment to the trustee should be demanded, and it was made for the purpose of enabling the trustee to demand the rentals for the protection of the bonds, whenever, in the judgment of the Trustee, it should become necessary to do so. This stipulation, in effect, makes the City of Dawson a party to the bond issue—for it solemnly promised that it would pay the rental to the trustee *for the bonds*. This stipulation authorized the trustee to notify the City of Dawson that it claimed and demanded payment of rentals in each year for the years 1896, '97 and '98, and for future years, and the fact that the Water Company acquiesced in that demand is no evidence of a transfer or assignment by the Water Company of any right it had in the rentals to the trustee.

The water rentals fall due annually as the water is furnished, and the rentals for each year could be sued for in separate actions, there would be a separate cause of action for each, or a suit could be brought for rentals for any number of years within the statute of limitations. Under the provisions of this contract, either payee would have a right to demand and receive the money—the payment of rentals to either would satisfy the contract—but a suit by one payee for the rental of 1895 does not prevent the other from suing and recovering for subsequent years. An adverse judgment against one alternative payee, in a suit for the rental for one year, could not be successfully plead in defense of a suit by the other payee for the rentals for other years, if such other payee was not a party to the first suit.

2 McLean, 139, and authorities cited in eleventh division of this brief.

XVIII.

But aside from the stipulation in the contract, which gives the Trustee the right to receive the rentals direct, the Trustee can prosecute this suit to protect the bonds secured by the mortgage on the property, and it is his duty to do so.

84 Fed. 369, Consolidated Water Co. *vs.* City of San Diego.

76 Fed. 296, Louisville Trust Co. *vs.* City of Cincinnati.

63 Fed. 213, Bowden College *et al. vs.* Merritt.

154 U. S. 362.

And the Trustee could prosecute its suit to protect the property covered by the mortgage, even though the water company, the mortgagor had placed itself in a position where it could not sue, for a udgment against the mortgagor can not be plead as an estoppel against the mortgagee, unless the mortgagee was a party to the suit.

Our contention is, first, that there has not been rendered by the Georgia Courts any judgment which would estop the Water Company from making the federal question that is made by the bill and answer in this case, were that company the complainant in this bill.

Second, that the trustee can sue regardless of any judgment or decision, touching the rights of the Water Company, in any suit to which it was not a party—and this the Trustee can do, in its right as alternative payee, or in virtue of its right as mortgagee, or in both rights.

See authority in eleventh division of this brief.

XIX.

Appellant contends that the Court erred in enjoining the collection of a city tax, or license fee, on the ground that the

contract in so far as it provides for "the remission of license fees, taxes, dues and claims, in consideration of water to be furnished to the public municipal buildings and two public fountains," is contrary to the constitution and laws of Georgia, and is void.

The contract in this respect is not void. The price of the water to be furnished to the municipal building and to two public fountains was estimated to be of equal value to city taxes on the property and the license tax required of other persons doing business in the city.

Such a contract has been held to be valid by the courts of Georgia. It has been decided by the Supreme Court of Georgia that a contract of this kind is lawful if the value of the water furnished is a fair equivalent for the taxes that should be paid on the property.

This question can be settled, if need be, on the final trial of the case. But no proof has been submitted to show that the Circuit Judge committed error in restraining the present attempt by the city to collect taxes.

XX.

It is alleged in several assignments of error, that the trustee has a remedy at law. It is true that the trustee might sue and recover at law for the years in which the city has used the water of the water company, but the relief sought—the protection of the property upon which a mortgage was given to the trustee to protect the bonds—can not be had in an action at law. Under the decision of the Supreme Court of Georgia, the City may end the contract at any time by refusing to be bound by it and ceasing the use of the water. The city has made known its purpose to do so by a solemn ordinance—and it was taking steps to erect waterworks of its own when the temporary injunction was granted by the Circuit Judge. If the city is not permanently enjoined from doing these things, it will cease to take water, which it has contracted to take—destroy the con-

tract—and under the decision of the Supreme Court of Georgia, there could not be any further recovery for water rents.

The right to sue in equity is clear:

169 U. S. 466-550.

XXI.

The question of having waterworks was submitted to the qualified voters of the City of Dawson, and practically all the votes cast were for waterworks. It is contended that the notice was not sufficient, and it is also contended that there is no statute law of the State, either in the charter of the city, or in the general law, which provides for an election to sanction a contract which creates a debt—that the only law of that character in Georgia relates to the issue of bonds.

Our reply is, even if the contract in question created a debt, yet the City of Dawson is estopped from setting up that defense.

The American Pipe Manufacturing Company, who bought the contract with the City of Dawson from Bennett, made a careful investigation of the contract, the locality, the water supply, etc., before purchasing. This company wished to float bonds to raise money with which to build the waterworks—a fact made known to the City of Dawson—and in order to enable the Pipe Company to arrange for floating the bonds, the City of Dawson was requested to extend the time of completion, which was done.

There is no pretense that any one was misled; and there is nothing in the record to show that the public did not know that the contract for water rent was made pursuant to the vote previously taken.

The contract was made, and the company was engaged for a year or more in erecting the plant, laying pipes, etc., in the streets, at a large cost, which facts will be presumed to have been known to every taxpayer in the City of Dawson, nothing

appearing to the contrary, and during all this time no complaint was made by any taxpayer. They should have complained before this large expenditure of money by the water company on the faith of this contract.

Before consenting to act as trustee, through its president, the trustee investigated the prospects of the contemplated water company. Both the agent of the Pipe Company and the president of the trustee talked with the officials and citizens of Dawson, and all were strongly in favor of the contract; no one opposed it.

In view of all the evidence in this case, and the contract to pay rentals to the trustee, the City of Dawson is estopped, after the issuance of the bonds, to which it practically became a party as herein set out, from asserting that its contract with the water company is invalid.

Com'rs of Knox Co. *vs.* Aspinwall, 21 Howard (U. S.) 539.

Bissell *vs.* Ciy of Jeffersonville, 24 Howard (U. S.) 287.

New Haven, etc., R. R. Co. *vs.* Town of Chatham, 42 Conn. 465.

This case also decides that the mode of voting is immaterial if the town knew of the mode that was adopted, and made no objection until after contractors expended labor and materials on the faith of the result.

Allegheny City *vs.* McClurkan & Co., 14 Penn. State 81. (Strong case.)

San Francisco Gas Co. *vs.* San Francisco, 9 Cal. 453.

Hackett *vs.* City of Ottawa, 9 Otto (U. S.) 86.

Board, etc., of Anderson Co. *vs.* Beale, 113 U. S. 227.

Town of Oregon *vs.* Jennings, 119 U. S. 74.

The two last named cases decide that the city and inhabitants may be estopped from setting up that a constitutional or statutory requirement that a contract shall not be made without the vote of the people had been disregarded.

The citizens of a municipal corporation may ratify the unauthorized acts of their agents, and when the official agents exceed their authority, the inhabitants composing the corporation will nevertheless be bound, if by their silence or representations, they permit contracts to be entered into which involve others in onerous engagements.

A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and can not by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims which their own conduct had superinduced.

9 Otto (99 U. S.) 86, Hackett *vs.* City of Ottawa.

14 Penn. State 81, Allegheny City *vs.* McClurkan & Co., 83, 84, 85.

76 Fed. 271, Illinois Trust & Savings Bank *vs.* City of Arkansas City.

The doctrine of estoppel is applicable to the case of a city or county setting up that an indebtedness was incurred without constitutional or statutory authority, by reason of not having received the assent of the qualified voters as required by the constitutional or statutory authority.

113 U. S. 227, Board, &c., of Anderson Co. *vs.* Beall (5).

119 U. S. 74, Town of Oregon *vs.* Jennings.

The same rule of estoppel is applied to a city by the Supreme Court of Georgia in case of a bond issue.

52 Ga., pp. 625, 630.

And in a case where a town voted to establish schools, it was held that no infirmity in the law, under which officers acted, or irregularity in the election, would avail after the expense of establishing schools thereunder had been incurred.

86 Ga. 605.

In the decision of the case of City of Dawson *vs.* Dawson Waterworks Company, 106 Ga., it was held that the rule of estoppel did not apply as between the parties in that case—there being no other party than the two named above before the Court. The Court said:

"The contest in the present case being between the original parties to the contract, and no negotiable instrument ever having been issued, the law in relation to the innocent holders of such instruments had no application whatever."

In the case at bar there is another party—the trustee for the bonds—and the contract hereinbefore referred to, and set out in the pleadings, practically makes the city a party to the bond issue. The contract is to pay direct to the trustee the rentals, the protection of the bonds, *i e.*, pay the interest on the bonds. This, we think, makes the city a party to the bond issue, as effectually as the case would be had the city issued the bonds direct. Under the decision of the Supreme Court of Georgia, the city is estopped from making the present defense against the trustee.

But we do not wish to be understood as conceding that this question of estoppel will, or should, be applied to this case according to the decision of the Georgia courts. For the application of the doctrine of estoppel to the facts of a case is a matter of general law, that this Court will decide for itself.

We contend that the city is not only estopped from setting up such defense against the complainant in this case, but should also be estopped were the Dawson Waterworks Company the party complainant in the case, as the law of estoppel will apply as well to an effort to break the contract with the water company, under the facts of this case, as it would to protect the holders of bonds, had the City of Dawson issued bonds. And such is the meaning of the decisions of the United States Courts hereinabove cited.

76 Federal R., 271—15th h. n.

XXII.

Further on the question of estoppel: It will be conceded that the city had the authority to make this contract under the "general welfare clause" of its charter. See authorities cited in the sixth division of this brief. If it were true that the contract created a debt, it is also true that the City of Dawson had the power to create a debt, the constitution did not confer this power upon the city, but prescribed the manner of exercising that power.

The constitution makes no provision for taking the sense of the qualified voters on the subject of creating a debt.

The Legislature passed an act for ascertaining the wishes of the qualified voters in respect of issuing bonds; but that act in terms applies to bonds, and can not be construed to be applicable to a contract of this kind.

Therefore, if the contract creates a debt, and the assent of the qualified voters is to be had, there is no provision in the general law of the State which prescribes the mode of ascertaining such assent, and the city had to furnish the mode.

As to the law generally on this subject, Dillon says: "Where a corporation has the power to act, and no method or mode of action is prescribed, it acts within its discretion."

Dillon, 4th Edition, section 94.

But more in point is a decision of the Supreme Court of Michigan, 76 N. W. 159, 2 h. n., wherein the court say:

"Where the law is silent as to notice, the common council possesses the authority to prescribe the method of notifying the electors."

Our contention is, that the only law which prescribes the method of submitting to a vote of the qualified voters of a city the question of creating a debt relates in terms to bonds. The Legislature has not seen proper to go any further in that direction, and where any other kind of debt is to be created, the

city authorities may submit the question to the qualified voters of the municipality in such manner as they may deem best, which will fairly test the sense of the voters thereof.

As the reckless issue of bonds by municipalities led to the constitutional restriction, the Legislature did not deem it necessary to do more than provide by statute for taking a vote on a proposition to create a bonded debt, leaving the mode and manner of giving notice and taking a vote in respect of all other kinds of indebtedenss to be provided by the municipal authorities.

In this case a vote was had on the question, "shall the city incur the expense of waterworks," and it is admitted that two-thirds of the qualified voters of the city voted to incur the expense.

The fact that the vote was taken on the proposition, "shall the city incur the expense of waterworks," did not prevent the municipal authorities from making a contract for water rent pursuant to that vote.

Broadnax *vs.* Groom, 64 N. C. 244.

Although the vote was on the question of incurring the expense of waterworks, yet the thing the city, and the voters, wished was water, they cared nothing for waterworks.

Some two years after this vote as taken, the contract in question was made, which provides for an annual water rental. The city got water. For more than a year the company was engaged in laying pipes in the streets, erecting hydrants, etc., with the knowledge of all the inhabitants of the city. The works were completed, the city and the inhabitants were supplied with water, a tax levy was made in each year to pay the rental, the tax rate was increased for that purpose, yet no man up to this hour has complained that he was ignorant of the fact that a contract had been made for water rent, and that it was made pursuant to that vote.

In the absence of any statute law regulating the giving of

notice of an election of this kind, that notice is sufficient which apprises the voters of what the authorities propose to do.

The notice in this case apprised the qualified voters of Dawson that the town wished to incur the expense of procuring water. It was not necessary to state in the notice the price to be paid, nor the length of time for which the contract should run, if the qualified voters were apprised of what was proposed, or were willing to leave that matter to the authorities, and we must conclude from the absence of any proof in the record to the contrary, that they knew the terms, or were willing to leave that matter to the discretion of the city authorities.

So we insist that the city would be estopped, under the evidence in the case, from making the defense that the contract is void under the constitution and laws of this State, even if the contract in question created a debt. 76 F. R. 271, 15th head note.

It will be conceded that there is no constitutional or statutory provision in Georgia, which prescribes the manner of conducting such elections by a municipality.

This being true, it is a matter of general law, and the United States Court can decide for itself whether there was an election held in the city of Dawson, and also as to the validity of that election.

XXIII.

(1) We contend that the Constitution of the State which inhibits the passage of a law giving irrevocable grants, etc., does not apply to a city which makes a contract for a water supply, and grants the exclusive right to the use of the streets by the company with whom it contracts.

(2) But if such inhibition does apply to an exclusive grant to use the streets of a city, then the constitutional provision hereinbefore referred to prohibits the withdrawal of such exclusive grant except in a way that will protect the interest of the water company and its bondholders, which has not been done, or attempted to be done, by the City of Dawson in this case.

(3) Without regard to whether the city could give to the water company the exclusive right to use the streets for its mains, pipes, etc., we contend that the contract made by the city with the water company binds the city to take its supply of water for the period of the contract from the Waterworks Company and from no other source.

(4) The contract in the case was in the shape of an ordinance, as will be seen by reference to Record page 288, and there was an attempt on the part ofthe city to revoke this contract without giving any reason whatever therefor. See Record bottom of page 318 and top of page 319. We insist that it was not in the power of the city to revoke a contract thus entered into. It is not a mere breach of contract by failure to pay water rentals, but it is a distinct effort to revoke the same, *i. e.*, annul it. The action of the Mayor and Council of the City of Dawson as set out in the record in proceeding by an election for the issue of water bonds to build its own waterworks, and notice to the Water Company that it would not carry out the contract with the Water Company, is a distinct effort to revoke the same and erect waterworks of its own, thus bringing the contract in this case squarely in line with the contract between the City of Walla Walla and the Walla Walla Waterworks Company. 172 U. S. *supra.*

(5) The City of Dawson, without any special legislation authorizing it to do so, had, under the general welfare clause of its charter, the power to make a contract by ordinance for a supply of water either by erecting waterworks of its own or entering into a contract for a supply of water with a water company. This power can not be doubted. See authorities cited in our brief on this subject. Having such authority, and having entered into a contract with the Dawson Waterworks Company for a term of years, its effort to revoke the contract is a distinct impairment o fthe obligation of the contract, and raises the federal question in this case.

(6) The allegations in the bill were established by the proof on the hearing before the Master. See Master's Report, beginning on page 76 and ending on page 116 of Record. This being true, the Trustee of the bonds of the Waterworks Company was entitled to a decree for specific performance on the facts in the cause, and under the authorities cited in this brief.

XXIV.

It is argued in behalf of appellant that the construction placed by the Supreme Court of Georgia upon the meaning of the term "debt," as contained in Article 7, Section 10, Paragraph 1 of the Constitution of this State, should be followed by this court, irrespective of its own views as to the correctness of the conclusions reached by the court and the soundness of the reasoning by which such conclusions were reached, notwithstanding the factthat the rights of the water Works Company and of complainant originated in a contract entered into in good faith long before such decision of the State court was rendered, and at a time when not only by the current of authority in other States, but by the reasoning adopted in decisions rendered in our own State, parties whose rights have accrued under that contract had the right to regard the contract as valid and binding.

It is conceded by the Supreme Court of Georgia in the decision of March 4, 1899, "that the ruling which we make in the present case is in direct conflct with the decision of the highest court in the land, as well with the current of American authority on the subject." (106 Ga., 714, supra.) It is practically conceded by apellant that, tested by the unanimous decision of this court in a well considered case (Walla Walla *vs* Walla Walla Water Co., 172 U. S., I.) and by the decisions of nearly every court, except our own State court, ~~that~~ constitutional and statutory provisions substantially similar and many of them in almost precisely the same words with the provision contained in our own Constitution, and which our own State court and

counsel for appellant alike concede are not to be distinguished by any difference in their wording, the contract in the case at bar is not a contract creating an indebtedness within the inhibition contained in the Georgia constitution. The brief in behalf of apellant does not attempt to combat the soundness of the reasons advanced in the Walla Walla case, and other similar decisions in support of the conclusions there reached.

The position taken by counsel for appellant, as stated in their brief, is as follows:

> "We are willing to concede to the citation the weight of argument therein contained, and that the same chain of reasoning might lead the court to a similar conclusion in this case, provided the *manifested policy of Washington* is the same as that of Georgia; but we can not admit that the decision in that case precludes us from asking this court to determine the issue presented here in accordance with the Constitution of the State under which it arose, it having held that different interpretations may be given in different States to laws even of a common prototype."—(Brief for Appellant, page 117.)

And while appellant's counsel recognize that in an extreme case this court may be constrained "by exasperating conditions to reject the conclusion of State courts," yet nothing less than such "exasperating conditions" will justify the court in refusing to accept as controlling decisions of the State courts, rendered after contract rights have vested and when the effect of following such subsequent decisions will be to destroy vested contract rights and deprive persons of their property dependent, for its value, upon the continued existence of such contract rights.

The Constitution of the United States is the supreme law. The rights safeguarded by that instrument are within the protection of the courts of the United States, and the courts of the United States are charged with the responsibility of determining for themselves both as to the existence of the right which it is claimed that the Constitution protects, and as to whether the action complained of is in violation or attempted impairment of

such right. The courts of the United States can not evade this high and responsible duty.

> "When a contract is asserted and the Constitution of the United States invoked to protect it, all of the elements which are claimed to constitute it are open to examination and review by this court; and also all that which is claimed to have taken it away."—(192 U. S. 73, Citizens Bank *vs.* Parker.)

In the case of Shelby County *vs.* Union & Planters Bank, 161 U. S. 149, the court say:

> "In such a case as this, where we are to construe the meaning of the clause of the statute as to what contract is contained therein, and whether the State has passed any law impairing its obligation, we are not bound by the previous decisions of the State courts, except when they have been so long and so firmly established as to constitute a rule of property (which is not the case here), and we decide for ourselves independent of the decisions of the State courts, whether there is a contract and whether its obligation is impared. (Citing) Louisville & Nashville Railroad *vs.* Palmes, 109 U. S. 244 256; Vicksburg etc., Railroad, *vs.* Dennis, 116 U. S. 665, 667; Mobile and Ohio Railroad *vs.* Tennessee, 153 U. S. 486, 492." (161 U. S., Shelby County *vs.* Union & Planters Bank, page 151 of the opinion.)

And the court further say:

> "While according to the decisions of the Supreme Court of Tennessee the respect which is most justly due it on account of the high character of that tribunal, nevertheless the responsibility is upon us to determine the question independently, and we can not agree with that court in its construction of the decisions of this court in the two cases mentioned." (*Ib.* 161 U. S. page 151.)

In the first case cited in the portion of the opinion above quoted, namely, Louisville & Nashville Railroad Company *vs.* Palmes, 109 U. S. 244, the court say:

"The question we have to consider and decide is, whether, in the judgment under review, the Supreme Court of Florida gave effect to a law of the State which, in violation of the Constitution of the United States, impairs the obligation of a contract. In reaching a conclusion on that point, we decide for ourselves, independent of the decision of the State court, whether there is a contract, and whether its obligation is impared; and if the decision of the question as to the existence of the alleged contract requires a construction of the State Constitution and laws, we are not necessarily governed by previous decisions of the State courts upon the same or similar points, except where they have been so firmly established as to constitute a rule of property. Such has been the uniform and well settled doctrine of this court." (Louisville & Nashville Railroad Co. *vs.* Palmes, 109 U. S., page 256 of the opinion.)

And the court cite in support of this opinion,

16 Howard, 416, 432.	Ohio Life Insurance & Trust Co. *vs.* DeBolt.
1 Black, 435.	Jefferson Branch Bank *vs.* Skelly.
1 Wallace, 116.	Bridge Proprietors *vs.* Hoboken Co.
107 U. S., 20.	Burgess *vs.* Seligman.

The same rule exists where jurisdiction is founded upon diversity of citizenship, but where during the progress of the case contract rights are to be passed upon, which accrued before decisions of the State court touching the validity or construction of the contract were rendered.

"The object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States, was to institute independent tribunals which would be unaffected by local prejudices and sectional views, and it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication." (193 U. S. 532, Great Southern Fire Proof Hotel Co. *vs.* Jones), citing, Burgess *vs.* Seligman, 107 U. S. 20.

"Without qualifying the principles that in all cases it is the duty of the Federal court to lean to an agreement with the State court, where the issues relate to matters depending upon the construction of the Constitution or laws of the State, and that the Federal court is bound to accept decisions of the State courts construing State statutes rendered prior to the making of the contract on which the cause of action is based, such duty does not exist in regard to decisions of the State court rendered after the cause of action has arisen, although before the action itself was commenced, when the Federal court in the exercise of its independent judgment reaches a different conclusion from the State court." (Ib. 193 U. S. 532.)

In that case the court say:

"In our opinion, neither the decisions of Palmer *vs.* Tingley, Young *vs.* Lion Hardware Co., 55 Ohio St., 423, nor any other case in the Supreme Court of Ohio precluded the Circuit Court from exercising its independent judgment as to the constitutionality of the statute of Ohio herein questioned. If prior to the making of the contracts between the plaintiffs and McClain, the State court adjudged that the statute in question was in violation of the State Constitution, it would have been the duty of the Circuit Court, and equally the duty of this court, whatever the opinion of either court as to the proper construction of that instrument, to accept such prior decision as determining the rights of the parties accruing thereafter. But the decision of the State court, as to the constitutionality of the statute in question, having been rendered after the rights of parties to this suit had been fixed by their contracts, the Circuit Court would have been derelict in duty if it had not exercised its independent judgment touching the validity of the statute herein questioned. In making this declaration, we must not be understood as at all qualifying the principle that in all cases it is the duty of the Federal court to lean to an agreement with the State court where the issue relates to matters depending upon the construction of the Constitution or laws of the State." (Ib. 193 U. S., pages 547, 548 of the opinion.)

The opinion delivered by Mr. Justice Harland for the entire court (except Mr. Justice White, who did not hear the argu-

ment and took no part in the decision) contains such a lucid statement of the true rule and the reasons upon which the same is based, that it leaves, we think, nothing to be added to this branch of the discussion.

The principal cases bearing upon the subject are referred to in a note to Burgess *vs.* Seligman, 107 U. S., on pages 34 and 35. The ~~elder~~ more recent cases have all of them followed Burgess *vs.* Seligman, 107 U. S., 20, *supra*.

XXV.

The appellant contends that the interpretation recently adopted by the Supreme Court of Georgia of the meaning of the term "debt" as used in the State Constitution, should be, by reason of local State policy, given a different meaning from what the language would naturally suggest, or from what would be its import according to the usual standard and tests of interpretation. And the Supreme Court of Georgia, in announcing a decision which the court recognized was "well-supported by reason, as well as by the current of American authority," seem to argue that there was something peculiar in the conditions existing in Georgia at the time the constitution of 1877 was adopted, and the years immediately preceding that date, which call for an interpretation of the words used different from the meaning which they would otherwise most naturally bear. We think, however, that an examination of the opinion in that case will fail to convince this court that any such reasons are shown.

An examination of the earlier decisions must convince the court that what the framers of the Constitution really had in mind was to forbid that system of "municipal aid" by which municipalities had been permitted to incur large bonded indebtedness in the giving of aid to railroads supposed to be of local benefit. That was the evil which existed prior to 1877, and bonded indebtedness would seem to have been what was aimed at. The Constitution intended to inaugurate the "pay as you go" policy, by which the future should not be burdened with

debt for what was consumed or wasted in the present. It does not appear that any of the cities or villages in the State had been extravagant in expenditure for water, lights, or other necessaries constituting the legitimate and ordinary expenses of a municipality. It must appear to the court as at least a little novel that if the recent decision is to be founded on public history our court seems not to have reached that conclusion until 1899, twenty-two years after the constitution was adopted, and Mr. Chief Justice Simmons, the only member of the court who was a member of the constitutional convention which framed the Constitution of 1877, or who was old enough to have a personal acquaintance with the political questions of that day, concurs in the opinion only because he feels himself bound by the decision rendered by the court when the same case was before the court the first time (102 Ga. 594, Mayor and Council of Dawson *vs.* Dawson Waterworks Company, where the decision of the court was based upon a record which did not bring up the full contract), and states:—

> "If it were an original question, I should hold, in accordance with nearly all the other courts of the Union, including the Supreme Court of the United States, when construing similar provisions of constitutions or statutes, that the making of the contract or agreement by municipal authorities for the supply of gas or water for a term of years, for a certain sum to be paid annually, is not a debt within the meaning of the Constitution. It is difficult for me to understand ~~how~~ about, after full argument and reflection, the making of the same contract by the same authority for one year, when there is no money in the treasury to pay it and tax is to be levied to meet the obligation, is not a debt, when if the same authority makes a contract for the same purpose for two years, or five years, it is a debt." (106 Ga., City of Dawson *vs.* Dawson Waterworks Company, opinion of Mr. Chief Justice Simmons, on page 737.)

The provision in the Georgia Constitution seems to have been copied, with slight and wholly immaterial change, from the Constitution of the State of Iowa, which, according to the interpre-

tation uniformly placed thereon by that Court, did not embrace within the term "debt" contracts of this character and description. In fact, it was not until the decisions in the Cartersville cases, 89 Ga. 683, 689, rendered in August, 1892, that our State court read into the Constitution a distinction between contracts for water or gas supplied on the credit of the city for one year, and contract for such supply for a longer period than one year, classifying the former as not falling within the meaning of the term "debt," and the latter as falling within that category.

It is ~~difficult to see~~ impossible to ascertain by what course of reasoning the court arrived at this distinction, as these two cases are what is known in our State as "Head Note" decisions, there being no written opinion by the court further than a brief statement or synopsis of the points ruled. No authorities are cited, but we think that the only authorities which could be found for such a distinction, and which the court probably came upon, were the decisions in two or three States based upon charter or statutory provisions forbidding a municipal corporation to incur any liability or expenditure in any year beyond the revenues arising out of taxes actually levied for such year, the court holding that such limitation inhibited a contract for expenditure for future years in advance of its being known what would be the revenues, or the amount of the expenditures for such years. We know of no authority outside of Georgia drawing this distinction with respect to the meaning of the term "debt." The decision in the Cartersville cases is one which our own court did not again follow until the decision in the Dawson Waterworks case, 106 Ga. 696, decided March 14, 1899. The Court, during the nearly seven years that had elapsed, had more than once an opportunity to restate the ruling in the Cartersville cases, but were not prepared to do so. In Dawson Waterworks *vs.* Carver *et al.* 95 Ga. 565, being a bill brought by tax-payers to restrain the City of Dawson from paying the Dawson Waterworks Company hydrant rentals for water used during the first half of the year 1894, the trial court refused to grant the injunction *pendente lite*, but in the order refusing the injunction declared that the city might have leave, if so desired, to treat the contract as a

contract valid only for the remainder of the current year and refuse to pay after that time. This decision being taken to the Supreme Court, that court could very well have settled the entire controversy by adhering to the ruling in the Cartersville cases, and affirming the decision of the court in toto. The Court held, however:

> "That there was no error in refusing to enjoin the payment by the city for water it had already consumed whether the contract between it and the Waterworks Company for the full period contemplated thereby was valid and binding upon the city or not."

But the court directed that so much of the order passed by the trial judge as might affect the right of the Waterworks Company to insist at the final hearing that the contract was valid for the entire period, should be stricken from the order, and that the parties should have the right to present that question at the final hearing. 95 Ga. 565, Dawson Waterworks Co. *vs.* Carver.

In the case of Dawson *vs.* Dawson Waterworks Company, 102 Ga. 594, the same questions were made that were made before the court the last time, and both parties asked for a decision on the merits. The court, however, found that they were able to dispose of the case without deciding this question, and did so. 102 Ga. 594.

As to this decision, the court say, in their later decision in 106 Ga. 735:

> "There is nothing in our present ruling which conflicts with this decision (102 Ga. 594). Upon an investigation of the case as then presented, it was found that one absolutely essential element necessary to constitute a cause of action was wanting, and the case was reversed because the direction of a verdict for the plaintiff was erroneous for that reason. There was no ruling made on any of the questions now decided, although such questions were made in the record."
>
> 106 Ga. 735.

And when the case came before the court the last time, the court was still unprepared to follow the Cartersville cases, and after holding the matter in abeyance from October 22, 1898, to January 30, 1899, a reargument was made on the court's own motion, and by reason of the difficulty in which the court found itself placed by the conflicting decisions which had been rendered.

The question has not again come before the court, but as pointed out by the Master in his report, the reasoning subsequently adopted by the court in the case of Epping *vs.* City of Columbus, 117 Ga. 263, is inconsistent with the reasoning adopted by the court in the opinion in 106 Ga. 696, the Dawson Waterworks case just referred to, and the conclusion can not be reconciled with the conclusion reached in that case. It will be seen that the decisions cited by the court in support of their conclusion in Epping *vs.* Columbus are decisions of the very same courts, and based upon the same reasoning, and sustained by the same authorities, which our State Court refused to follow in the Dawson Waterworks case.

We do not concede that in the interpretation of contracts the decisions of the State Court rendered after the contract, which is sought to be impaired, is entered into and rights have vested thereunder, are to be regarded by this court as binding upon the theory that the interpretation by the State Court of its own State laws as a matter of local policy and local concern, ~~to which~~ and not merely the rights of innocent persons who have acquired contract rights based upon what the State laws would mean according to a sound and natural interpretation are to be sacrificed.

It was the purpose of the Constitution to preserve the right of contract against the impairment and destruction according to the varying and fluctuating views which the court or legislature might adopt as to local or sectional policy. A person in Pennsylvania or New York would not be willing to enter into a contract, and embark his money in building up enterprises in Georgia or Washington if his contract must stand or fall, not according to its validity under the laws then of force according to the natural and sound rules of interpretation, and such settled course

of decisions as might properly be regarded as a part of the law itself, but according as the State court might incline to one view or another according to that vague, fluctuating and wholly uncertain standard intimated by the Supreme Court in the decision in the Dawson Waterworks case, and adopted by counsel for appellants, namely, local views, local policy, local sentiment seeking to find support for themselves in local State history, But for the supposed necessities of local policy and its influence ~~upon~~ retroactively local legislation and local courts, it perhaps would not have been found necessary to elevate the obligations of contracts above the protection to be found in State constitutions and statutes and the administration of justice in State courts. The sound interpretation of contracts, unbiased by local, narrow, and sectional views, the rigid adherence to rules requiring good faith in their performance, are the foundations upon which have been built the greatness of our American nation. The protection afforded by the Federal Constitution against the impairment of contracts is something more than the basis of our commercial and industrial unity as parts of one great nation; it preserves and safeguards good faith and fair dealing, and serves to perpetuate at all times, and in all places, and under ~~divers~~ local and temporary conditions, that individual and personal honesty and integrity in business dealings, without which no people can permanently enjoy the blessings of prosperity and liberty.

XXVI.

As a part of the relief prayed by the bill and awarded by the decree, the complainant has recovered against the city hydrant rentals from the beginning of the year 1896 up to the time the decree was rendered, with interest thereon.

(The bill did not ask to recover hydrant rentals for 1895, or the amount of hydrant rentals retained by the city under its claim for back taxes.)

It is the city's contention that there ought to have been no

recovery of these hydrant rentals by the trustee. We think there is no merit in this contention.

Without the city's consent, the Water Company had the right to mortgage its property, including these hydrant rentals, and to stipulate, either at the time the mortgage was made, or at any time thereafter, that the mortgagee should have the right to collect these hydrant rentals. The right to pledge and mortgage is an incident to the right of owning property. Promises to pay money are property and may be mortgaged. It is well settled that a corporation may mortgage its future acquired property and its future income, even though the contract out of which the income is to arise is not yet in existence. In the case at bar, however, it certainly does not lie in the city's mouth to object to the Water Company's right to pledge its income to secure the bonds. The city knew that the money with which the waterworks were to be constructed was to be obtained by the issue and sale of bonds. By ordinance it enlarged the time for beginning the construction of the works, in order to give the owner of the contract time to market its bonds. To offer inducements to persons to purchase the bonds, it is stipulated in the ordinance which constitutes the contract that the city shall pay the hydrant rentals to "said company or such trust company as the Dawson Waterworks Company may elect or decide upon as the trustee for their bonds." Before the mortgage was actually given, the President of complainant company came down to Dawson with a view to looking into the situation before complainant was willing to undertake to act as trustee, and the Mayor and Council in a body received him, and pointed out the different features which made the bonds of the Company attractive and desirable securities, and actively aided in inducing the Trust Company to handle and recommend the bonds to their customers.

The bonds were recommended and purchased largely on the strength of the inducements held out by the mayor and council to the Trust Company, represented by its president.

The mortgage in express terms conveys these hydrant rentals not only to secure the interest but to secure the principal of the mortgage bonds. A mortgagor may always pay the debt before

the maturity, with the consent of the creditor. The mortgagor may turn the property or any part of it over to the creditor to enable him to collect his debt. When the city by its conduct had so impaired the mortgage security as that the same was no longer sufficient to cover the mortgage debt, surely it will not be contended that the debtor had no right to make his creditor's loss as small as possible by turning over to the creditor the hydrant rentals, whether the same had been already collected or were yet to be collected, the hydrant rentals so turned over being themselves a part of the mortgage security. The city is not a creditor, and it is hard to see what concern it is of the city's as to what the Water Company may see fit to do with its hydrant rentals. It could not use the same for any more legitimate purpose than to pay its debts.

There were other good reasons why the Water Company should turn over to the trustee for the bondholders all such right and title as remained in it to these hydrant rentals. By the city's wrongful act and course of conduct in repudiating its contract, the Waterworks Company had been placed in a position where it was no longer able to raise the necessary revenues to enable it in future to carry out its contract with the city, and thereby conserve the property mortgaged to secure its bonds. It was proper that the bondholders being placed where it might be necessary for their trustee to pay out money in making such extensions and betterments as become necessary after a lapse of time should be reimbursed and saved harmless, as far as possible, against such burdens and necessary expenditures by having turned over to their trustee the right to these past due hydrant rentals, as well as the hydrant rentals that should fall due in the future. The trustee having received the hydrant rentals was placed in a position such that betterments could be erected whereby the service was substantially improved. The city having complained that the old stand pipe was become leaky, and that the pressure was thereby affected, seven thousand dollars was expended in erecting a new stand pipe of twice the capacity of that called for by the contract, forty feet higher than that re-

quired by the contract constructed of steel and of the most substantial character, and it is undisputed that since that time the pressure has at all times been considerably in excess of the contract requirements throughout every portion of the system. This was erected under an amendment by which it was asked that the hydrant rentals when collected be applied to repay the amount so expended. If bondholders and the Water Company were willing that the hydrant rentals be used for this purpose, and ~~then~~ the aid of the court as a Court of Equity be furnished for their collection in order that the same be used for such purposes, it is hard to see upon what equitable ground the City of Dawson can complain. The city, we take it, will hardly contend that it has the vested right to receive ~~poorer~~ service when through the aid of the court and with the consent of all persons upon whom the burden will fall, better service is furnished than the contract calls for or requires.

At the time the bill was filed, the need for an injunction was immediate and urgent. The city was about to sell its bonds and erect a rival waterworks system, which would practically destroy the value of the security held by these bondholders. A delay until there had been default in the payment of interest and until the Trustee would have had the right to institute foreclosure proceedings by the terms of the mortgage would have been ruinous and would have led to almost the utter annihilation of the bondholders' security. A bill for injunction, if for no other purpose, was an immediate necessity. It is undisputed that long before the final decree was rendered there had been such default as would have authorized the Trustee to foreclose the mortgage, and invoke the aid of the Court to collect and apply to the mortgage debt these hydrant rentals. Such right would have become mature more than four years before the rendition of the final decree. Equity abhors a multiplicity of suits. Its endeavor is to do complete justice in respect to the subject-matter in a single proceeding. It is difficult to see how a city has any right to complain that the decree against it for hydrant rentals is rendered in the present suit, and that two suits were not brought covering the same subject matter and

both necessitating an inquiry into the same facts, and a determination of the same questions of law.

Nor is it any concern of the city's that the Trustee has not through foreclosure proceedings taken possession of the waterworks property, other than the hydrant rentals. The decree in the present case, to which the trustee for bondholders is a party, and by which the bondholders are bound, gives the City of Dawson the right to the carrying out of the present contract superior to any right of the bondholders to take over this property for their debt.

XXVII.

The city in its defense set up that there had been a failure by the Waterworks Company to furnish water for fire protection of a pressure up to the requirements of the contract.

This the city sets up as a reason why it should not be required to carry out the contract at all. The city denies that it has received and used the water. It denies that it ought to pay anything at all. There is no defense of partial failure of consideration. It appears from the evidence that during the entire time the city has used the water at every fire that has occurred in Dawson since the city's repudiation of its contract. It appears that many destructive conflagrations have been prevented by the use of the water. It appears that valuable property has been saved at these different fires amounting to many times the aggregate of the hydrant rentals since the contract first went into effect. At one particular fire the use of the water saved property to the amount of hundreds of thousands of dollars. The city had no other water supply, and up to a few weeks before the filing of the bill, had done nothing looking to the furnishing of a water supply for fire protection, except to obtain authority by vote of the qualified voters to issue and sell bonds, which, however, the city made no attempt to sell until after the rendition of the decision in the Dawson Waterworks case in March, 1899.

It will be seen, we think, by an examination of the defend-

ant's contention that no good reason is shown why this decree for hydrant rentals should not be approved and affirmed as correct.

XXVIII.

An examination of the evidence in the case and of the testimony offered and rejected will show, we think, that there has been at no time any substantial failure on the part of the Water Company to furnish the required pressure.

The long, stubborn fight which has grown out of the City's repudiation and annulment of its contract has naturally stirred up on the part of some of the citizens much rancor and bitterness, and this has led to criticism where no cause for criticism existed, has caused all failures which occurred during the time of greatest demoralization and inefficiency of the fire department; to be charged to the character of the water service furnished; and moreover had led to much exaggeration and coloring of the facts. When the evidence is all sifted, however, when the witnesses' misinformation and hearsay opinions are all separated from their knowledge, when the effects are considered in connection with the existence of facts adequate to cause them, and such as would have caused them whatever might have been the character of the service furnished, the court will have no difficulty in agreeing with the master in his finding that there has been at no time any substantial deficiency of service or failure on the part of the water company to comply with the requirements of its contract. In order, however, that the court may have present before them certain facts which may serve as guides in finding their way through this mass of evidence, we call attention to the following points:

From the time the waterworks were completed up until after the city's repudiation of its contract, viz.: From August 12, 1891, to January, 1895, the water was used at the numerous fires which occurred (and there is no contention that the fires which occurred during that period were less frequent than during any subsequent period of equal length). At none of these

fires was there any complaint of any deficiency or insufficiency or lack of pressure, and there was no dissatisfaction with the character of service furnished at the time the city repudiated its contract, and the repudiation was wholly disconnected with the character of service furnished.

From January 1, 1895, until the summer of 1897, there is no complaint of any insufficiency of pressure or failure of the waterworks company to comply with its contract in every particular, save in 1896, at which fire it appears from the affidavit of B. R. Fussell, the water was only half turned on, a fact only discovered at the end of the fire. At the first trial of the case of Dawson Waterworks Company against the City of Dawson, in the latter part of November, 1896, it appeared from the evidence, which is in the record, that no evidence was offered of any failure or defect of pressure at any fire up to that time. The first fire as to which there is a complaint of lack of pressure was the Green & Whichard fire, which occurred June 11, 1897. General complaints there are in the testimony of some of the witnesses, but nothing definite and specific, and it affirmatively appears from the testimony of witnesses skilled in the work of extinguishing fires and in a position to know, that in fact no complaint of dissatisfaction existed up to the date of that fire, except the one fire in 1896, above referred to. The fires of which complaint were made occurred nearly all of them in the summer, and those as to which the most serious complaints existed were at night, between midnight and day, before the pumps started in the morning, at a season in the year when consumers would leave their hydrants running all night, in violation of the rules of the company, and being at the time when the pressure dropped lowest. The fires were out near the end of one of the smallest mains where the friction loss was greatest. These fires occurred at a time when the city was not adequately supplied with new hose, but on the contrary nearly all the hose was old and defective and of inferior quality. There was no system of rejecting hose. The fire department was in a state of general inefficiency. Long lines of hose were used, such as were sufficient to account for the difference in pressure between that due

to the height of head in the reservoir and the pressure actually furnished through friction loss on well understood principles of hydraulics, even without taking into account the additional loss due to the leaks, roughened lining, and other defects in the hose. There was no intelligent head to direct at these different fires. The hose lines were laid without any due regard to the sizes of the mains, more hose lines being used than was proper with mains of that size. The testimony as to the actual pressure is conflicting, and it will be seen that the witnesses whose testimony apparently is relied upon, is in conflict with those witnesses best in a position to know the truth and least likely to be swayed by partisan passion and prejudice. As soon as the City reorganized its fire department and placed the same in a state of comparative efficiency, it will be seen that the improvement was immediate and marked, and after the city established a paid fire department, there has been at no time any complaint as to the pressure. The city used the water at all fires which occurred. The fires in respect of which there is complaint as to the pressure, are a very small part of those which occurred during the period in question. The water was used with success and many thousands of dollars of valuable property was saved.

XXIX.

The City at no time ever made any complaint to the Waterworks Company as to the character of the service—inadequacy of pressure. No complaint was ever made to the Trustee for the bondholders. It would have been easy to determine the pressure at all times by the use of gauges. When the City established a paid fire department, a gauge was placed in the engine house. The gauge has at all times since the city placed it there shown sufficient pressure. The Trustee for the bondholders never heard that there was ever any dissatisfaction or complaint as to the character of the service, or the amount of pressure until the coming in of the answer to the rule after the filing of the present bill. As soon as this was done the Trustee for the bondholders by amend-

ment asked that the rentals when collected might be allowed to go to the making of such betterments and extensions as the due protection of the rights and interests of the bondholders might require, and that if need be, certificates of indebtedness be authorized for such purpose. The amendment having been allowed, the necessary funds were raised without the issue of certificates of indebtedness, and a new reservoir was erected of more than double the capacity required in the contract, and of a greater height than the first reservoir. Since the erection of this new reservoir there has been no complaint as to pressure. The order granted by His Honor, Judge Pardee, for injunction *pendente lite* contained this provision:

> "Ordered that the defendants may apply to the court at any time after thirty days from the date of this order for a test of the ability of the Dawson Waterworks Company to fully and satisfactorily perform all its obligations and agreements in the regard to the furnishing of water to the city of Dawson for all municipal purposes in the extinguishing of fires included, according to the letter and spirit of its contract; and thereupon the court will order a test and trial of the same by experts under the direction of a Master, and take such action on the Master's report as equity may require."
>
> (Record page 56.)

This order was passed September 16, 1899, and it required, of course, considerably more than thirty days to complete a new reservoir; in fact, the evidence shows that the new reservoir was not completed until the spring or early summer of 1900.

As bearing upon the question of the City's good faith in urging this contention, that the pressure furnished was not sufficient, it is to be borne in mind that the City did not ask that such test and trial be ordered. It is no answer that the Waterworks Company might for a few hours, or a day or two, establish pressure in order to answer the test. If defects of pressure existed by reason of the defective condition of the water tower, or the

fact that the increased consumption of water for domestic purposes had overtaxed the size of the pipes so as to leave them incapable of supplying the required pressure, nothing that the Waterworks Company could do could prevent an expert from discovering such fact.

Moreover, it is well-known that at a trifling expense a self-registering gauge could be put in showing the water pressure at any given part of the system, which it was desired to test, at every time during the twenty-four hours of each and every day throughout as many weeks or months as it was desired to extend such test over, and an expert worthy of the name would have no doubt adopted means to fairly and thoroughly test the efficiency furnished by the system at all times, and at its weakest point or points.

XXX.

The contract itself provides a simple mode of determining the sufficiency of the pressure, viz.: the system

> "Was to produce a pressure on the mains such that from any hydrant located on the principal streets, a stream of water will be projected fifty feet vertically in still air through one hundred feet of fire hose with a one-inch nozzle attached."
>
> (Record p. 289).

The same section provides that in the event there is such failure, the Company shall be allowed a reasonable time to make repairs.

The City never proceeded under this section of the contract.

> "On one occasion the local superintendent of the Water Company tested the pressure from a point on what is known as an "end" pipe. The water failed to reach a height of fifty feet vertically. It was shown that this test was a voluntary act of the local superintendent, without notice

to the officers and owners of the Waterworks Company, or to the City."

(Master's Finding, page 92 of Record.)

It appears that this voluntary test by the local superintendent was during a period of unusual drought in midsummer, and shortly after there had been a fire at which much water had been used. It was on what is known as an "end" pipe, at a point further from the reservoir, and in the quarter of the city where the chief growth of the town had taken place, leading of course to an increase of water consumption for domestic purposes, and a consequent diminution of pressure which the pipe would furnish for fire purposes. The attention of the Waterworks Company was not called to the fact, and no request was made to reinforce that portion of the system; the water at this voluntary test did not fall very much below the required fifty feet. It can not be contended, we think, that this solitary failure of one hydrant out of a total of fifty hydrants, shown to be due to exceptional conditions not existing in the case of the other forty-nine hydrants, and of which the Waterworks Company was not apprised and no request made for the reinforcing of that portion of the system, or for the testing of the other portions of the system, can be regarded as any proof that the system at that time was not meeting the requirements of the contract. Moreover, the test was not made under those safeguards which are necessary to guard against error.

XXXI.

Some testimony was offered on behalf of the city, and rejected by the Master, to the effect that at certain fires specified, the stream of water thrown was of various specified heights less than fifty feet. This is assigned as error by the appellant.

In view of the character of this testimony, such ruling, if erroneous, was immaterial, and the testimony, if admitted, could

not change the Master's, findings or affect the relief to which the complainant is entitled. We think, however, that the court will agree that the view taken by the Master as to the admissibility of this testimony was correct.

The Master offered to admit the testimony if the defendant would state that it proposed to show the existence of conditions substantially similar to those required by the contract in order to produce pressure which the contract requires, or would connect the testimony and show from the height of the stream actually thrown that under the prescribed conditions the stream would have been less than 50 feet, called for by the contract, under the conditions named in the contract.

In view of the fact that the contract furnished an easy and simple test which could have been made at any time, and as often as the city might desire at any and every part of the system, it would seem to be a hardship that notwithstanding the contract provision securing to the water company the right to have the question of the sufficiency of its pressure determined by these definite and simple tests, the city should be permitted to substitute uncertainty and conjecture for certainty. The Master admitted testimony as to the pressure at all those fires where the lines of hose used were not very much greater than those called for in the test prescribed by the contract.

The testimony shows that at these other fires at which it was proposed to show that the pressure was less than the fifty feet, long lines of hose were used, such as would lead to great loss of pressure even if the hose had all been new with smooth and perfect lining and without leaks at the joints ; the hose was old, leaking at the joints, with lining roughened and obstructing the flow, and the loss of pressure was of course very much greater. The witnesses did not even know how many feet of hose were used, but it was shown by the distance of the nearest hydrant to the place where the fire occurred, that the distance, upon the theory that the shortest possible amount of hose was used, would be in every instance considerably in excess of the contract requirements. It was shown, however, not to be the case that the lines of hose were only of

such length as were sufficient to reach the fire. The fire companies would run off a line of hose as long as they happened to have at hand, frequently using a number of surplus lengths, causing loss of pressure, not only on account of increased length, but on account of the fact that the hose would become doubled and twisted with sharp curves and corners instead of the water flowing in a straight line. It was not contemplated that the water pressure furnished was to do the work in extinguishing all fires that occurred without being reinforced by ordinary intelligence and skill on the part of the users. On long lines of hose there should not be ordinarily more than a single line to one of the smaller mains. The city would needlessly use a number of different lines dividing between them, and hence wasting pressure which would have been sufficient for a single line. Moreover, on long lines it is necessary and proper to reinforce the pressure by twin couplings, bringing two streams together and uniting the same into a single stream at a point near the fire, thus by two streams allowing for the loss of one-half of the pressure due to the length of each line.

Moreover, where longer lines of hose are used, it is expected that the fire engine should be employed to reinforce the gravity pressure. The city allowed its fire engine to get out of repair, and ceased to employ an engineer to run it. We contend that it would be exceedingly unjust to the water company under such circumstances to permit unsatisfactory results to be received as evidence that the company on its part was not furnishing the pressure required by a specific test fixed by the contract.

> "Evidence that waterworks tested with hose from 150 to 400 feet long did not throw water seventy-five feet high, is not evidence that the waterworks did not have the capacity to throw a stream that high through a hose 100 feet long, and of a certain size as provided by the contract."
>
> 60 Pac. Rep. 196, Grand Junction Water Co. *v.* Grand Junction. (Court of Appeals of Colorado).

"The original test, in the presence of the city officials, other tests made by the company for its own satisfaction, and results at fires all indicating the capacity of the works to fulfill the requirements, were proven. * * * *

"The evidence introduced by the plaintiff of the ability of its works cast the burden upon the defendant; and in proving the tests upon which it relied, it was incumbent upon it to show that they were within the conditions specified in the contract, beyond which no obligation rested upon the company. * * * * * *

"The length of hose through which the company bound itself to be able to discharge a volume of water 75 feet high was 100 feet; and not only was the length of hose specified, but its size and the size of the nozzle. It did not contract to send streams through more than 100 feet. The force sufficient for that length would, by reason of the additional friction, fail at a greater distance. A test made through 400, or 360, or 150 feet would be absolutely worthless. To prove the want of ability in the works which would amount to a failure of compliance with the contract, not to exceed 100 feet of 2½-inch hose, with a one-inch nozzle, must be used, and evidence not showing affirmatively tests made under contract conditions would be no proof at all."

(Same case, 60 Pacific Rep., p. 200, of opinion.)

XXXII.

The city at all times having received and enjoyed the use of the water, can not decline to pay therefor on the ground of alleged defects, in the absence of any specific pointing out of the alleged defects, and a request that the same be corrected, and a reasonable opportunity afforded within which the same might be corrected after the same was pointed out.

14 S. E. 961, Wilson *vs.* City of Charlotte; s. c. 110 N. C. 449.

It is the duty of the City where the contract requires tests to determine whether the pressure comes up to the requirements of the contract, to make such tests in order that the Water

Company may have the right to remove the defect if any exists.

> 49 N. W., 272, State *ex rel.* Tarr *vs.* Mayor and Council of Crete; s. c. 32 Neb. 568.

The Court say in that case:

> "A city, like an individual, should act in good faith in carrying out its contracts. To construct waterworks like these in this case requires a considerable outlay of money. This in the case at bar seems to have been borrowed, and the lender and equitable owner asks the city to test the works, and if found to conform to the contract, to approve the same, and relieve him from the heavy burden of maintaining the works while the city has the benefit of the same; and in effect if there are slight deficiencies or slight variances from the terms of the contract, that the same may be corrected, and the works if, when corrected, they are found to conform to the terms of the contract, be accepted."

Ib. page 282 of opinion.

It is the duty of a party who is furnished an article under a contract containing certain requirements either to reject the article and refuse to accept it, or if he accepts and uses it, to at once complain of the defects, in order that the party furnishing such article may have an opportunity to remove the defects. We think the principle of natural right and justice contained in this rule is applicable to service of the character furnished in the case at bar. It would seem to be inequitable to permit the city year after year to continue to receive valuable service under a contract containing a specific provision giving the city the right to subject the pressure to a definite test and call upon the water company to make the water comply, and if not, then to forfeit the right of the water company, and deriving great benefits therefrom, and refusing payment after suffering years to elapse without ~~payment~~ Complaint on the ground of alleged defects, which if properly complained of, the water-

works company would no doubt have removed, and which if the same ever existed were removed as soon as knowledge came to the water company of any complaint. We belive that this proposition commends itself to a court of equity. We cite in support of it:

62 Federal Reporter, 853, 856, National Waterworks Company *vs.* Kansas City. Court of appeals, Eighth circuit. Opinion by Mr. Justice Brewer, at Circuit.

39 S. W. Rep. 768, Lamar Water & Electric Light Co. *vs.* City of Lamar, Syllabus 3.

It is one of the established principles of the law of sales—a principle founded on the plainest dictates of fairness and justice—that where an article is furnished pursuant to a contract requiring it to be of a certain quality, the buyer must at least object to its quality within a reasonable time after its receipt, or else the law will treat the receipt as a final acceptance and preclude any later objection on the ground of inferior quality.

(Citing Benjamin on Sales, section 703; Graff *vs.* Foster, 67 Missouri, 520; Aurora Water Company *vs.* City of Aurora, 129 Mo. 540; 31 S. W. 946).

"We know of no reason why that rule of law should not be applicable to the water furnished by the defendant to plaintiff. It would be plainly unjust for defendant to receive the water as furnished under the contract for a year or more, and then when called upon for payment, first raise the question of its quality. Water is not an article capable of being conveniently returned, and the reason for requiring a proper objection to such a commodity is even stronger than in the case of the sale of many other articles."

39 S. W. Reporter, page 770 of the opinion; s. c. 140 Missouri Rep. 145.

See also 70 Northwestern Rep. 323, Alpena Water Company *vs.* City of Alpena. (Supreme Court of Michigan).

38 Southwestern Reporter, 89, Neosha Water Company *vs.* City of Neosha, Missouri.

32 Pacific Reporter, 663, City of Winfield *vs.* Winfield Water Company. (Supreme Court of Kansas.)

Even if the city had properly complained and given the water company an opportunity to remedy the defects, yet, the city having continuously used the water, the defense to the suit for recovery of hydrant rentals that the water did not come up to the contract requirements would be defective inasmuch as the city failed to show how much it was damaged by such alleged defects, or how much less valuable, if any, the water was by reason of such alleged defects. The water having been furnished under a contract and having been used under the contract, the city can not successfully defend upon the ground that it is less valuable than contracted for, without showing affirmatively as a necessary part of such defense, the extent to which the city was thereby damaged.

27 Southern Reporter, City of Glenville *vs.* Glenville Waterworks Company. Supreme Court of Alabama.

62 Northwestern Reporter, 613, Sykes *vs.* City of St. Cloud. Supreme Court of Minnesota.

In that case the court say:

"It is claimed by the defendant that there must be a punctilious performance of the contract on the part of the Waterworks Company, or that it can not recover at all, because in the case of defective service, there is no means of measuring the damage which would accrue between full and complete service and deficient or defective service. In the case of Wiley *vs.* Inhabitants of Athol, 150 Mass. 426, 23 Northeastern Rep. 311, heretofore cited, it is held that 'the measure of damages was the difference between the value of the supply of water actually furnished and of that which by the contract should have been furnished, estimated with reference to the uses for which it was furnished.' We are of the opinion that the rule

adopted in this case is correct and applicable to the case at bar, if the defendant should so amend its answer as to conform to the rule of law herein laid down."

XXXIII.

We think, however, another sufficient reply to the city's contention that it should not be required to pay for these hydrant rentals by reason of alleged deficiencies of pressure at certain fires, is found in the fact that if any failures existed, the same are to be charged to the city's own act in withholding from the Water Company its necessary revenues in violation of the contract and accompanied by a repudiation of the obligations of the contract. It appears that there is no contention that there was ever a deficiency of pressure until long after the city had repudiated its contract and withheld from the Water Company the revenues which the city had agreed to raise by taxation and to pay under the contract. At the time of this alleged failure to furnish water of the required pressure the city was indebted to the Water Company for hydrant rentals, in amounts varying from about eight thousand dollars at the beginning to about eleven thousand dollars at the end of the time. Not only were these revenues withheld, but the Water Company was placed where it could not honorably have borrowed money for the purpose of making betterments, extensions or repairs without disclosing conduct on the part of the city which would have destroyed its credit. If the making of necessary repairs had been too long delayed, if the system had not been extended in the direction in which the city grew, leading to a diminution of pressure in that quarter, if the revenues were insufficient to enable the company to operate its pumps at night, as well as by day, and therefore on a few occasions during unusually dry seasons in the summer, the pressure dropped down for a few hours, before the engine that operated the pumps was fired up in the morning, the fault is to be laid at the door of the City of Dawson, which was planning to get the benefit of the fire protec-

tion without paying for the same, and thereby so cripple the Waterworks Company as to prevent it from making the extensive improvements which by the undisputed evidence it was shown it had contemplated, and would have duly made, but for this conduct on the part of the city. It is to be borne in mind, too, that the general inefficiency of the fire department which contributed so largely to this failure is itself the effect of the city's pretense that it was not receiving and using the water and enjoying the fire protection afforded it under the contract, so as thereby to enable it the more effectually to repudiate and annul the contract, and evoke a decision that it was not bound to perform the same.

Least of all should the city be permitted to set up such contention against the bondholders whose property the city during all these years was engaged in a persistent effort to destroy. The city knew at the time that it repudiated the contract that this property, including these hydrant rentals, constituted the security to which these bondholders looked for the money which created this system of waterworks and gave the city and its inhabitants the benefit and use of this water. The city knew that the amount of this debt exceeded the sum which the city was willing to pay for the waterworks, and the valuation which the city placed upon the entire property, yet the city in its efforts to destroy the contract and thereby bring about the destruction of the property which derives its value from the contract, withheld from the bondholders and their trustee all information or knowledge of the city's purpose or the litigation by which it was seeking to carry such purpose into effect. Neither the trustee nor the bondholders had ever heard that there was any trouble, or had any knowledge or information that there was ever at any time any complaint of want of pressure or inefficiency of service. As soon as such complaint came to their notice, notwithstanding the city was still engaged in its effort to destroy the contract and their security, a new and larger reservoir was built at large expense under the agree-

ment that the cost was to be paid out of the hydrant rentals, using up to that extent their security, and giving to the city at all times and at every part of the system a fire pressure in excess of the contract requirements.

XXXIV.

The city's conduct throughout this matter has not been such as to commend it to a court of equity. It entered upon its effort to repudiate the contract and destroy this property for no reason other than that the city desired to own the waterworks, and the Waterworks Company had not in its offer to sell named a price which the city was willing to pay. The service furnished had at all times been satisfactory. It appeared from the evidence that the Waterworks Company made every effort to meet the wishes of the city and its people. No question or suggestion had ever been made that the company had failed to comply with. Before the resolution of June 27, 1894, was adopted, the Waterworks Company had under consideration plans of extensive improvement, and the city was so advised, and only the city's repudiation of its contract led to their being abandoned. The stock ownership in the waterworks is held by a company having contracts with municipalities for public water supply. It has been its invariable policy to meet the wishes of the city and the water consumers as far as possible. The source of supply was selected by the city. The works were constructed in a manner that met the city's full approval. The city undertook the policing and protection of the sources of supply. No request has ever been made of the Water Company for any other measures of protection than those which have been adopted. There is no suggestion that any other available source of supply exists, and it was not until after seven thousand dollars had been expended in the erection of a new reservoir in order to meet the only complaint that the city had made up to that time (and that as soon as the complaint came to the knowledge of the water company) that the city by its later answer set up its

dissatisfaction with the sources of supply which it originally selected, which the city assumed to police, and was under the duty of policing and protecting, and which does not appear to be substantially different from what it was at the time of its selection. The city's complaint that a butcher pen exists within the water shed was first heard of when the testimony was taken before the master on behalf of the defendant. Not only had there been no request to the Water Company to take action, but the city, it had been supposed, would deal with, under the police power, any duties placed upon the city by the Act of the Legislature. After the testimony was closed, and the report of the master rendered, the city asked to open up the testimony to admit evidence that birds had been allowed to roost on the reservoir, and one of them had fallen in and been drowned. The Waterworks Company, as soon as it was learned that the fact that the water tower was the tallest object in that locality, made it a sort of watch tower on which birds congregated, placed a contract for a covering for the reservoir, and the same was completed and put in place as early as it was possible to secure the material. The city knew that the steel sheeting had been ordered, and that the delay was due to the mills being overcrowded with orders, and that the Water Company had at last succeeded in getting the material, and had its contractor on the ground engaged in the construction of this roof when this application to open up the case and take fresh testimony was made. This matter is mentioned in order to show the city's attitude throughout this litigation.

It is only by furnishing to the inhabitants of the city good service that the Water Company or the bondholders who are the equitable owners of the property, can hope to make their property a paying investment. They only await a final decision of this burdensome and unfortunate litigation to give to these good people the most efficient and satisfactory service that the conditions render possible.

We believe the majority of the good people of Dawson deplore

the course upon which the city has embarked, and a final and just decision of this controversy will, we believe, be most fortunate to all interests alike.

Respectfully submitted.

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